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"We Don't Want Anybody Anybody Sent": The Death of Patronage Hiring in Chicago

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"WE DON'T WANT ANYBODY ANYBODY SENT": THE DEATH OF PATRONAGE HIRING IN CHICAGO

*Cynthia Grant Bowman**

Former Congressman, now federal judge, Abner Mikva tells the following story about how the Democratic Organization of Cook County, Illinois—otherwise known as "the machine"[1]—reacted to his initial expression of interest in political involvement:

> The year I started law school, 1948, was the year that Douglas and Stevenson were heading up the Democratic ticket in Illinois. I was all fired up from the Students for Douglas and Stevenson and passed this storefront, the 8th Ward Regular Democratic Organization. I came in and said I wanted to help. Dead silence. "Who sent you?" the committeeman said. I said, "Nobody." He said, "We don't want nobody nobody sent." Then he said, "We ain't got no jobs." I said, "I don't want a job." He said, "We don't want nobody that don't want a job."[2]

This interchange epitomizes the political culture of Chicago in the heyday of the machine: the machine did not want any participants over whom it did not hold the power associated with employment. Patronage was, quite simply, the fuel that ran the machine.

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From 1984 to 1986, I was one of a three-person team of private attorneys who were engaged by the City of Chicago to negotiate principles for a Plan of Compliance with the *Shakman* judgment, to assist in the negotiation and drafting of Detailed Hiring Provisions to ensure that hiring took place on non-political grounds, and to monitor compliance with the judgment.

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[1] A "machine" has been defined as that "kind of political party which sustains its members through the distribution of material incentives (patronage) rather than non-material incentives (appeals to principle, the fun of the game, sociability, etc.)." Wilson, *The Economy of Patronage*, 69 J. POL. ECON. 369, 370 n.4 (1961).

[2] M. RAKOVE, WE DON'T WANT NOBODY NOBODY SENT: AN ORAL HISTORY OF THE DALEY YEARS 318 (1979). Jesse Jackson reports a similar experience when he asked to be made a precinct captain shortly after moving to Chicago: " 'Okay,' his committeeman said after some deliberation, 'and there's a job for you too.' 'I don't want the job,' Jackson said, 'I'm a preacher.' 'Then we don't want you,' he was told." W. GRANGER & L. GRANGER, FIGHTING JANE: MAYOR JANE BYRNE AND THE CHICAGO MACHINE 77 (1980).

It is therefore not surprising that this political setting gave rise to many of the landmark constitutional cases challenging patronage hiring and firing. One early case was brought against Richard Elrod, a Democrat, who was elected Sheriff of Cook County in 1970. In time-honored fashion, Elrod proceeded to replace many of the Republican employees of the sheriff's office with Democrats. In *Elrod v. Burns*,[3] a suit by several of the discharged employees, the Supreme Court held that patronage dismissals were unconstitutional. In another early case, *Shakman v. Democratic Organization of Cook County*,[4] disappointed independent candidates for office brought suit to prohibit governmental bodies from basing hiring and firing decisions on political grounds. Although eighteen years after the suit was filed the United States Court of Appeals for the Seventh Circuit would reverse its own prior decision and determine that the *Shakman* plaintiffs did not have standing,[5] the suit first resulted in a consent decree banning political discrimination in employment in the City of Chicago.[6]

Finally, in June of 1990 the Supreme Court held patronage hiring unconstitutional in *Rutan v. Republican Party of Illinois*,[7] a case which also arose out of partisan struggles in Illinois, though not in Cook County. Since *Rutan*, it has been illegal to take political affiliation into consideration in either hiring or firing public employees, unless the employees are in policymaking positions.[8]

Justice Antonin Scalia wrote a lengthy and intense dissent to the *Rutan* opinion, in which he echoed the sentiments of Justice Powell in his dissents to the Court's earlier patronage decisions.[9] Scalia predicted that the *Rutan* decision "may well have disastrous consequences for our political system."[10] This article will evaluate Justice Scalia's doleful prediction in light both of recent social science research and of the City of Chicago's extensive experience with both patronage hiring and its prohibition.[11]

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[3] 427 U.S. 347 (1976).

[4] 310 F. Supp. 1398 (N.D. Ill. 1969), *rev'd*, 435 F.2d 267 (7th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971).

[5] *Shakman*, 829 F.2d 1387 (7th Cir. 1987), *cert. denied*, 484 U.S. 1065 (1988), *rev'g* 435 F.2d 267 (7th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971).

[6] Actually, the *Shakman* litigation resulted in two consent decrees, one in 1972 banning political discrimination in firing and one in 1983 banning patronage hiring. *See* Shakman v. Democratic Organization of Cook County, 481 F. Supp. 1315, 1356-59 (N.D. Ill. 1979) (setting forth the 1972 consent decree governing current employees); Shakman v. Democratic Organization of Cook County, 569 F. Supp. 177 (N.D. Ill. 1983).

[7] 110 S. Ct. 2729 (1990).

[8] For a discussion of the policymaking exception to the ban on patronage hiring and firing, see *infra* notes 91-93 and accompanying text.

[9] Elrod v. Burns, 427 U.S. 347, 376-89 (1976) (Powell, J., dissenting); Branti v. Finkel, 445 U.S. 507, 521-34 (1980) (Powell, J., dissenting).

[10] *Rutan*, 110 S. Ct. at 2747 (Scalia, J., dissenting).

[11] Many of Justice Scalia's comments apply to the firing context as well. However, my discus-

Chicago provides an ideal case study of patronage hiring for a number of reasons. First, under Mayor Richard J. Daley (1955-1976), Chicago was commonly viewed as the last of the classic urban political machines, fueled by patronage. Second, Chicago now has six years of experience implementing a detailed hiring plan designed to prevent politically motivated employment decisions and thus provides a testing ground for Scalia's foreboding predictions about the abolition of patronage. Finally, Chicago witnessed—indeed, contributed to—the development of an abstract legal standard to curb patronage while experiencing a dramatic political change with far-reaching effects on the institution of patronage: the mobilization of Black voters[12] culminating in the 1983 election of Harold Washington, a Black mayor who opposed the machine and vowed in his campaign to put an end to the patronage system. Thus, the Chicago experience provides a springboard from which to examine the effects of both patronage and its abolition upon an urban minority that is rapidly approaching majority status.

In Part One, I briefly describe the history of patronage hiring, culminating in a more detailed account of the rise of the Chicago machine and its operation during its "Golden Age." In Part Two, I chronicle the demise of that machine with the political mobilization of the Black voter in Chicago. Part Three outlines the parallel development of the constitutional standard governing patronage during this period. Finally, in Part Four, I examine the most important policy objections raised by Justice Scalia to the prohibition of patronage hiring, evaluating them in light of Chicago's substantial history and experience with this institutional practice. This examination leads me to conclude that the most common objections to the prohibition of patronage hiring are, by and large, unfounded.

PART ONE: THE RISE OF THE MACHINE

A. A Brief History of Patronage Hiring.

China, originator of the first civil service system, is also credited with the first known patronage system, in which the ancient Chinese rul-

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sion will be confined to the principal change wrought by the *Rutan* decision—the extension of *Elrod* to the hiring context. For commentary on *Elrod* and the prohibition of politically motivated discharges, see, *e.g.*, *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 186-96 (1976); J. Moeller, *The Supreme Court's Quest for Fair Politics*, 1 CONST. COMMENTARY 203, 213-17 (1984); Comment, *Patronage and the First Amendment after* Elrod v. Burns, 78 COLUM. L. REV. 468 (1978); Note, *Politics and the Non-Civil Service Public Employee: A Categorical Approach to First Amendment Protection*, 85 COLUM. L. REV. 558 (1985).

12 Following the lead of Kimberle Crenshaw, I use an upper-case "B" throughout this article to refer to Blacks, to denote that Blacks, like Hispanics or Asians, constitute a specific cultural group and should be referred to by use of a proper noun. *See* Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

ers bartered offices in exchange for agricultural produce.[13] This practice was developed to an art in the seventeenth century by the Stuart and Bourbon kings, who discovered that immense revenues could be gleaned from the sale of offices.[14] The kings soon found, however, that this profitable practice was not without its costs, as the venalization of offices and other abuses of patronage played a role in the discontent precipitating the French Revolution.[15]

Nonetheless, the infant American republic soon established its own system of patronage hiring.[16] Thomas Jefferson, after his election as President in 1801, replaced the Federalists, who had dominated government employment under Washington and Adams, with Republicans.[17] Andrew Jackson, however, is usually given credit for the institution of a "spoils system" in the United States.[18] Like Mayor Richard J. Daley over a century later, President Jackson insisted on overseeing all patronage appointments.[19] In his turn, Abraham Lincoln replaced 1,195 of the 1,520 presidential appointees with his supporters after his first election.[20]

With the rise of municipal services and the attendant employment possibilities in the latter half of the nineteenth century, patronage systems soon developed in most major American cities as well as in Washington, D.C.[21] Reform movements quickly followed, reflected, for example, by Thomas Nast's cartoon attacks upon Boss Tweed.[22] Before the advent of the modern welfare system, however, urban machines provided many essential goods and services to impoverished city-dwellers—contributions of food, fuel, and rent, as well as jobs—in exchange for

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13 M. TOLCHIN & S. TOLCHIN, TO THE VICTOR: POLITICAL PATRONAGE FROM THE CLUBHOUSE TO THE WHITE HOUSE 319 (1971).

14 *Id.* at 321.

15 *See, e.g.*, R. PALMER & J. COLTON, A HISTORY OF THE MODERN WORLD 183-84, 354-56 (6th ed. 1984).

16 *See* C. PRINCE, THE FEDERALISTS AND THE ORIGINS OF THE U.S. CIVIL SERVICE 2-6 (1977).

17 *See* R. HOFSTADTER, THE IDEA OF A PARTY SYSTEM 133-35, 156-58 (1970). *See also* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

18 The phrase "the spoils system" apparently derives from New York Governor Marcy's comment during the Jacksonian era that "[t]o the victor belong the spoils of the enemy." M. TOLCHIN & S. TOLCHIN, *supra* note 13, at 323.

19 *Id.* at 324; M. ROYKO, BOSS: RICHARD J. DALEY OF CHICAGO 17 (1971). However, the numbers involved were substantially different. Jackson replaced only 252 of 612 executive officeholders and 600 of 8000 postmasters, while it has been estimated that Mayor Daley controlled some 30,000 to 35,000 public jobs and an equal number in private industry. M. TOLCHIN & S. TOLCHIN, *supra* note 13, at 325; P. KNAUSS, CHICAGO: A ONE-PARTY STATE 98-99 (1972); Wolfinger, *Why Political Machines Have Not Withered Away and Other Revisionist Thoughts*, 34 J. POL. 365, 373 (1972).

20 M. TOLCHIN & S. TOLCHIN, *supra* note 13, at 326.

21 Calvert, *The Manifest Functions of the Machine*, in URBAN BOSSES, MACHINES AND PROGRESSIVE REFORMERS 45-55 (B. Stave & B. Stave eds. 2d rev'd ed. 1984).

22 J. ALLSWANG, BOSSES, MACHINES AND URBAN VOTERS 7-8 (rev'd ed. 1986).

their votes.[23] In some places, machines also played a critical role in the political mobilization of urban immigrants, assisting them with the naturalization process and then registering them to vote.[24] Because the early reform movements were largely nativist and anti-Irish Catholic in their orientation and failed to recognize that urban machines served important needs of inner-city populations, the reformers made little headway against the urban bosses, however.[25]

During the Progressive era (roughly 1890-1915), most objections to patronage focused upon its central role in urban corruption.[26] Lincoln Steffens exposed the corruption in American cities in *The Shame of the Cities*, published, city by city, in *McClure's Magazine*.[27] Steffens' installment on Chicago depicted it as a beacon of good government amidst the mud of corruption in other cities.[28] At about the same time, however, Jane Addams told a somewhat different story from her viewpoint as an activist on the West Side of Chicago, where she encountered "Boss" Johnny Powers of the Nineteenth Ward. In an 1898 article, Jane Addams described the alderman's function as employment broker:

> [T]o find jobs when work is hard to get, to procure and divide among his constituents all the places which he can seize from the City Hall. The Alderman of the Nineteenth Ward at one time made the proud boast that he has two thousand six hundred people in his ward upon the public payroll. This, of course, included day-laborers, but each one felt under distinct obligations to him for getting the job.[29]

Although she shared the paternalism and class prejudices of the urban settlement workers of her time,[30] Jane Addams nonetheless recognized the functions the ward boss was performing for his constituents, as a kind of modern "Robin Hood."[31]

In his typically colorful fashion, George Washington Plunkitt of Tammany Hall defended this role of the urban political machine as employment broker and social welfare agency by posing this graphic rhetorical question: "How are you goin' to interest our young men in their

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23 *See, e.g.*, Cornwell, *Bosses, Machines, and Ethnic Groups*, 1964 ANNALS AM. ACAD. 27, 30-34.

24 S. ERIE, RAINBOW'S END: IRISH-AMERICANS AND THE DILEMMAS OF URBAN MACHINE POLITICS, 1840-1985, at 94-97 (1988).

25 *See, e.g.*, R. HOFSTADTER, THE AGE OF REFORM 174-86 (1955).

26 *See id.* at 186-214.

27 J. ALLSWANG, *supra* note 22, at 14-19.

28 L. STEFFENS, THE SHAME OF THE CITIES 14-16 (1904).

29 Addams, *Why the Ward Boss Rules*, in URBAN BOSSES, MACHINES AND PROGRESSIVE REFORMERS, *supra* note 21, at 10-15.

30 Jane Addams referred, for example, to the "primitive people, such as the South Italian peasants who live in the Nineteenth Ward." *Id.* at 10. *See also* Davis, *The Settlement Worker Versus the Ward Boss*, in URBAN BOSSES, MACHINES AND PROGRESSIVE REFORMERS, *supra* note 21, at 108-21; Philpott, *Settlement House Workers: Not Of The People*, in URBAN BOSSES, MACHINES AND PROGRESSIVE REFORMERS, *supra* note 21, at 121-33.

31 Addams, *supra* note 29, at 10.

country if you have no offices to give them when they work for their party?"[32] If civil service were instituted, mused Plunkitt, it would be impossible to maintain party loyalty and organizational accountability.[33]

In sum, by the beginning of this century, patronage hiring had become a central feature of the political organizations in many American cities. Local political leaders used the allocation of public employment, along with other favors, to ensure that the masses of urban voters would support the local party at the polls yet overlook the rampant corruption which characterized urban government. Thus, although civil service was initiated on the national level with the passage of the Pendleton Act in 1883, civil service reform did not spread to state and local government, for the most part, until the middle of the twentieth century.[34]

B. The Golden Age of the Chicago Machine.

The modern Chicago political machine was built by Anton Cermak, who welded Chicago's disparate ethnic groups into a powerful multi-ethnic coalition to defeat the charismatic William Hale ("Big Bill") Thompson, a Republican who had served as mayor from 1915 to 1923 and from 1927 to 1931.[35] Cermak proceeded to build a tightly structured, disciplined, and centralized party by the use of patronage.[36] Upon acceding to power as Chicago's mayor in 1931, Cermak promptly fired some 2,000 of the city's temporary employees and used their positions to reward his own supporters.[37] By 1936, a study conducted by University of Chicago sociologist Harold F. Gosnell reported that nearly three quarters of the city's precinct committeemen were holders of public jobs.[38]

With the consolidation of the Cermak machine in 1933 and the advent of the New Deal, the Republican Party was virtually eliminated as a force in Chicago politics after 1933.[39] Following Cermak's untimely death in 1933 as the result of a bullet apparently aimed at Franklin Delano Roosevelt, the leadership of the party organization fell into the con-

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32 W. RIORDON, PLUNKITT OF TAMMANY HALL 15 (1948 ed.). In 1905, William L. Riordon, a political reporter for the New York Post, published PLUNKITT OF TAMMANY HALL, a collection of talks he allegedly had with the ward boss.

33 *Id.* at 18-19. Justice Scalia displays similar concerns in the *Rutan* decision and, indeed, quotes George Washington Plunkitt. Rutan v. Republican Party of Illinois, 110 S. Ct. 2729, 2747 (1990) (Scalia, J., dissenting).

34 F. KRAMER, DYNAMICS OF PUBLIC BUREAUCRACY 92 (1977).

35 For accounts of Cermak's construction of the multi-ethnic political coalition that came to be known as the Chicago machine, see J. ALLSWANG, A HOUSE FOR ALL PEOPLES: ETHNIC POLITICS IN CHICAGO 1890-1936 (1971); A. GOTTFRIED, BOSS CERMAK OF CHICAGO: A STUDY OF POLITICAL LEADERSHIP (1962).

36 J. ALLSWANG, *supra* note 22, at 117; P. KLEPPNER, CHICAGO DIVIDED: THE MAKING OF A BLACK MAYOR 24, 29 (1985).

37 J. ALLSWANG, *supra* note 22, at 115.

38 H. GOSNELL, MACHINE POLITICS: CHICAGO MODEL 56 (1937).

39 Green, *The 1983 Chicago Democratic Mayoral Primary: Some New Players—Same Old Rules*, in THE MAKING OF THE MAYOR: CHICAGO 1983, at 19 (M. Holi & P. Green eds. 1984).

trol of two men, Edward J. Kelly, who became mayor, and Patrick Nash. Under Kelly and Nash's leadership, the Cermak coalition broadened its base to include substantial numbers of Blacks, who grew from 6.9% to 13.5% of the city's population from 1930 to 1950.[40]

In 1955, the machine's back-room oligarchs, Thomas Keane, Jacob Arvey, and Joe Gill, put forth Richard J. Daley as the organization's latest candidate for mayor. Although Keane, Arvey, and Gill may have intended to retain control over the machine when they put Daley into office, Daley quickly moved to establish personal control over the party organization, the City Council, and—perhaps most important—the city's vast legion of patronage positions.[41]

Daley controlled approximately 35,000 patronage jobs, and he is said to have personally scrutinized applications for all of them.[42] He therefore controlled an average of ten jobs per precinct, more than 150 per ward.[43] But some wards were more equal than others. Denizens of Bridgeport—Daley's home ward—held approximately 2,000 patronage jobs, or about one job for every 19 residents.[44] Moreover, by 1970, one in every four male Irish Chicagoans reported to the census-taker that he worked for the city.[45]

Many of these jobs were nominally covered by civil service, but the machine got around this obstacle by a variety of means. First, it was sometimes possible to identify party workers who were on the civil service list.[46] Alternatively, the machine could sidestep civil service regulations by holding civil service exams infrequently and posting the results so late that most applicants would have found other jobs in the meantime.[47] When it was "not possible" to fill a position from a civil service list, "temporary" employees could be hired, many of whom were reappointed, while remaining "temporary," for as long as 20 years.[48] The number of temporary employees grew from 3,478 in 1955, the year Daley was elected, to 15,680 in 1970.[49] The particular beauty of tempo-

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40 P. KLEPPNER, *supra* note 36, at 17-19.

41 M. ROYKO, *supra* note 19, at 93.

42 Wolfinger, *supra* note 19, at 373 (35,000); P. KNAUSS, *supra* note 19, at 98 (32,000). Mayor Daley reportedly also could reward supporters with an estimated 30,000 jobs in private industry and arrange union cards as well. M. TOLCHIN & S. TOLCHIN, *supra* note 13, at 19, 33; M. ROYKO, *supra* note 19, at 64.

43 Wolfinger, *supra* note 19, at 373; Wilson, *supra* note 1, at 372.

44 P. KNAUSS, *supra* note 19, at 86.

45 Kemp & Lineberry, *The Last of the Great Urban Machines and the Last of the Great Urban Mayors? Chicago Politics, 1955-77,* in AFTER DALEY: CHICAGO POLITICS IN TRANSITION 4 (S. Gove & L. Masotti eds. 1982).

46 J. ALLSWANG, *supra* note 22, at 118-19.

47 *Id.* at 142; P. KNAUSS, *supra* note 19, at 101-03; M. ROYKO, *supra* note 19, at 63.

48 P. KNAUSS, *supra* note 19, at 101-03; M. TOLCHIN & S. TOLCHIN, *supra* note 13, at 40-41; J. ALLSWANG, *supra* note 22, at 142-43.

49 P. KNAUSS, *supra* note 19, at 103.

rary employees was that they could be dismissed at will, making them especially susceptible to party control.

Another way Daley ensured that the allocation of public jobs remained in the hands of the machine was not to make the general public aware of vacancies which were not filled by competitive examination. Openings were not posted or advertised publicly; instead, records concerning job opportunities were kept on file in the headquarters of the Democratic Organization in the Sherman House Hotel, across the street from City Hall.[50] After being channeled through the Democratic Central Committee, certain jobs were then assigned to individual ward committeemen as their preserve.[51] On the city-wide level, this process ensured that the Central Committee and its chairman, Daley, could maintain control over the ward bosses by manipulating the assignment of jobs to them. On the ward level, the process ensured that precinct captains could be rewarded—as most were—with public employment, or "viced" (replaced) when they failed to deliver the vote in their precincts.[52] It is conservatively estimated that each patronage job resulted in at least six votes.[53]

The result of this elaborate system was that Richard J. Daley controlled a formidable mechanism to mobilize the vote on election day. The coalition he assembled—of working class, white ethnic, and Black voters, supported by the business community which had been wooed and won by Daley's massive building program in the downtown area—virtually monopolized primary elections from 1955 to 1976 and was unbeatable at general elections for city office.[54]

PART TWO: THE DEMISE OF THE MACHINE

A. The Mobilization of the Black Voter and the Demise of the Machine.

Since Mayor Richard J. Daley's death on December 20, 1976, the multi-ethnic coalition that was the Democratic machine has unravelled. The combination of demographic change, poor and fragmented leader-

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[50] *Id.* at 98.

[51] *Id.* Alderman Vito Marzullo is reported to have said, "I got an assistant state's attorney, and I got an assistant attorney general, I got an electrical inspector at twelve thousand dollars a year, and I got street inspectors and surveyors, and a county highway inspector. I got an administrative assistant to the zoning board and some people in the secretary of state's office. I got fifty-nine precinct captains and they all got assistants, and they all got good jobs." M. ROYKO, *supra* note 19, at 62.

[52] P. KNAUSS, *supra* note 19, at 97. Patronage employees were also required to work on election day, to buy and sell tickets to party fundraisers, and to contribute a fixed percentage of their salaries to party coffers. *Id.* at 100.

[53] *Id.*

[54] Grimshaw, *The Daley Legacy: A Declining Politics of Party, Race, and Public Unions*, in AFTER DALEY: CHICAGO POLITICS IN TRANSITION, *supra* note 45, at 57-86; J. ALLSWANG, *supra* note 22, at 55.

ship within the machine, and the rise of an independent Black political movement dealt the machine a series of blows that weakened its grasp on political power in Chicago. Since Daley's death, there have been as many contested primary elections in Chicago as there had been in the previous 43 years.[55] Moreover, the Democratic Organization lost virtually every major primary contest between 1979 and 1990.[56]

The seeds of the machine's demise were sown long before the death of Mayor Daley, however. It was clear from the late 1960s that there was a large pool of increasingly disaffected voters—the growing Black population of Chicago.[57] The Black population grew from 6.9% in 1930 to 39.8% in 1980.[58] Prior to the New Deal, these incoming residents primarily supported the Republican Party, as the party of Abraham Lincoln, the Great Emancipator.[59] "Big Bill" Thompson relied heavily upon their support in the elections of 1915 and 1927, appointing a number of Blacks to responsible positions in city government in return for their support.[60] When Cermak became mayor and the Democratic Party began its ascent to dominance of city politics, most of these Black appointees lost their jobs.[61] Nonetheless, with the advent of the New Deal, Black voters moved *en masse* into the Democratic Party. While Black Chicagoans voted 82% Republican in 1931, the year of Cermak's election, by 1935 they voted 78% Democratic.[62]

In Chicago, inner-city Black wards were organized from about 1940 to 1970 by the so-called "sub-machine" of Congressman William L. Dawson.[63] While Dawson's wards regularly turned out for Daley, they did not receive the patronage rewards one would expect from their vote totals; and what jobs Blacks did receive were, with some exceptions, low-paying and non-supervisory.[64] Even though paltry by comparison with the patronage received by white ethnic groups, this treatment was probably better than that which greeted Blacks in the private sector.

A 1970 study concluded that Chicago was the country's second

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55 Green, *supra* note 39, at 20.

56 P. KLEPPNER, *supra* note 36, at 246.

57 Preston, *The Resurgence of Black Voting in Chicago: 1955-1983*, in THE MAKING OF THE MAYOR: CHICAGO 1983, *supra* note 39, at 44.

58 P. KLEPPNER, *supra* note 36, at 17; BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1990, at 34 (1990).

59 *See, e.g.*, ST.C. DRAKE & H. CAYTON, BLACK METROPOLIS: A STUDY OF NEGRO LIFE IN A NORTHERN CITY 343-52 (1945); *see also* D. TRAVIS, AN AUTOBIOGRAPHY OF BLACK POLITICS chs. 2-9 (1987).

60 ST.C. DRAKE & H. CAYTON, *supra* note 59, at 348-50; D. TRAVIS, *supra* note 59, at 56, 79.

61 ST.C. DRAKE & H. CAYTON, *supra* note 59, at 352; J. ALLSWANG, *supra* note 22, at 115.

62 D. PINDERHUGHES, RACE AND ETHNICITY IN CHICAGO POLITICS: A REEXAMINATION OF PLURALIST THEORY 75 (1987).

63 James Q. Wilson used the term "sub-machine" to describe the Dawson organization. J. WILSON, NEGRO POLITICS: THE SEARCH FOR LEADERSHIP 50 (1960); *see also* D. TRAVIS, *supra* note 59, chs. 13-14.

64 P. KLEPPNER, *supra* note 36, at 64-90; Preston, *supra* note 57, at 92.

most segregated northern city, outdone only by Dayton, Ohio.[65] Cramped into narrow boundaries, with inadequate housing and inadequate schools, Chicago's Black population began to withdraw its loyal support from the machine in the mid- to late 1960s. Even though Black support for the organization's candidates remained strikingly high, voter turnout in the Dawson wards declined from a high of 54.5% in 1955, in Daley's first election as mayor, to 20.2% in the 1977 mayoral election.[66]

This dramatic withdrawal of Black voters from the electoral process followed upon a series of events which underlined the Chicago machine's insensitivity to Black concerns. These events — the stoning of Martin Luther King during marches for integrated housing,[67] Mayor Daley's famous "shoot to kill" order during the 1968 riots,[68] the Black Panther raid,[69] and the city's resistance to protracted lawsuits aimed at integrating schools and neighborhoods[70]—inflamed racial tensions and made it appear that the machine was, in effect, the protector of the interests of white ethnic voters, in opposition to those of the Black populace.

The final blow was struck by Mayor Jane Byrne (1979-1983), who motivated Black voters to reenter the political arena in large numbers. Although she was herself a product of the machine, Byrne was elected mayor as an anti-machine candidate in 1979, largely due to the support of large numbers of Black voters.[71] Almost immediately after her election, however, Mayor Byrne turned her back on these Black supporters

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65 Kemp & Lineberry, *supra* note 45, at 14 (citing Sorenson, Taeuber, & Hollingsworth, *Segregation Indices for 109 Cities*, 8 SOC. FOCUS 125 (1975)).

66 *Id.* at 16. *See also* Grimshaw, *supra* note 54, at 75-79.

67 In 1965 and 1966, Martin Luther King, Jr. led a coalition of civil rights groups called the Coordinating Council of Community Organizations (CCCO) in a series of marches for the integration of neighborhoods in Chicago. After marching through Marquette Park and being hit by a thrown rock, King is said to have remarked that "[t]he people of Mississippi ought to come to Chicago to learn how to hate." Polikoff, Gautreaux *and Institutional Litigation*, 64 CHI.[-]KENT L. REV. 451, 452 (1988). *See also* A. ANDERSON & G. PICKERING, CONFRONTING THE COLOR LINE: THE BROKEN PROMISE OF THE CIVIL RIGHTS MOVEMENT IN CHICAGO (1986).

68 Following the assassination of Martin Luther King, Jr. in April of 1968, Mayor Daley issued a "shoot to kill" order in reaction to riots which broke out in Black sections of Chicago. *See* P. KLEPPNER, *supra* note 36, at 8.

69 Chicago police raided the apartment of Black Panther Party leader Fred Hampton in the early morning of December 4, 1969, killing Hampton and Mark Clark while they were asleep in their beds, but the police then reported that their deaths were the result of a "shoot-out." *See, e.g.*, D. TRAVIS, *supra* note 59, at 427-38.

70 *See, e.g.*, P. KLEPPNER, *supra* note 36, at 41-62; Polikoff, *supra* note 67, at 453-61.

71 Byrne's narrow (15,000 vote) victory over Daley's successor, Michael Bilandic, in the Democratic party primary of 1979 was caused at least in part by Bilandic's arrogant and inept handling of a major snowstorm that hit the Black community particularly hard in the winter of 1979; Byrne's tenacious campaigning on Chicago's Black south side also earned her considerable support within a Black community that felt completely ignored by Bilandic and the machine. *See* D. TRAVIS, *supra* note 59, at 531; B. Hodes, The Construction, Maintenance and Fragmentation of the Chicago Democratic Organization 142-43 (1987) (unpublished manuscript on file with author).

and re-embraced the machine.[72] She appointed a number of white ethnics to the Board of Education and the Chicago Housing Authority, although the clients of both agencies were primarily Black.[73] Even more strikingly, she supported a ward remap that would have resulted in the underrepresentation of Black voters.[74]

The result was a massive Black boycott of "Chicago Fest," one of Mayor Byrne's pet festivals, and the intensification of a grass roots campaign to register voters in the Black community in the early 1980s.[75] Between 1979, when Jane Byrne was elected, and 1983, when Harold Washington was elected, the registration of Black voters increased from 69.4% to 89.1%—more than twenty percentage points higher than comparable figures for the white population.[76] In February of 1983, the extraordinarily high vote margins turned in by the Black wards, coupled with a split in the white vote between Byrne and Mayor Daley's son and "heir apparent," State's Attorney Richard M. Daley, resulted in the nomination of Harold Washington as the Democratic candidate for mayor of Chicago and ultimately in his election as the city's first Black mayor.[77]

B. Harold Washington and the Attack on Patronage.

Harold Washington was elected mayor in the April 1983 general election with 51.8% of the total vote and 98% of the Black vote.[78] A major theme of Washington's 1983 campaign was his attack on patronage, as he repeatedly vowed to lift the yoke of patronage off the backs of city workers.[79] Although Washington got his own start in politics through the machine, he was uncomfortable with the "exchange" model of politics represented by the patronage system.[80] After he had himself broken with the machine, Washington described his conclusion that the continuation of a patronage system was injurious to the interests of the Black citizens of Chicago:

For most Chicagoans, the word patronage conjures up images of jobs dis-

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72 W. GRANGER & L. GRANGER, *supra* note 2, at 222.

73 P. KLEPPNER, *supra* note 36, at 137-42.

74 *Id.* at 140.

75 *Id.* at 145-49; J. ALLSWANG, *supra* note 22, at 154.

76 P. KLEPPNER, *supra* note 36, at 149. High Black turnout, in fact, almost succeeded in defeating the re-election bid of long-time Republican Governor James Thompson in 1982. *Id.* at 150; Green, *supra* note 39, at 24.

77 *See* P. KLEPPNER, *supra* note 36, at 166-70, 217; J. ALLSWANG, *supra* note 22, at 157.

78 J. ALLSWANG, *supra* note 22, at 57; Day, Andreasen, & Becker, *Polling in the 1983 Chicago Mayoral Election*, in THE MAKING OF THE MAYOR: CHICAGO 1983, *supra* note 39, at 98.

79 Allswang, *The Best of Machines? The Last of Machines?*, in URBAN BOSSES, MACHINES AND PROGRESSIVE REFORMERS, *supra* note 21, at 231; M. KAHN & F. MAJORS, THE WINNING TICKET: DALEY, THE CHICAGO MACHINE, AND ILLINOIS POLITICS 254-55 (1984).

80 McClory, *Up from Obscurity: Harold Washington*, in THE MAKING OF THE MAYOR: CHICAGO 1983, *supra* note 39, at 6.

> pensed by the local political father, the Democratic ward committeeman. This practice gives the ward bosses a power no individual should have — total control over the lives of thousands of men and women. The ward bosses exact a price which no citizen of a democracy should be forced to pay, and that is the fact that patronage workers must set aside their personal political values and forget the needs of their communities to work for machine candidates who are often unqualified, incompetent or completely unresponsive to constituents.
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> * * *
>
> [D]owntown bosses force Black patronage workers to campaign for politicians who work against Black interests and they deprive Black Chicago of its fair share of city jobs. They hand Black businesses only the smallest crumbs from the thick government contract pies. I once believed that the patronage system should be reformed so that my community would receive its fair share, but I now understand that patronage can't be doled out fairly. Equity demands that we dismantle the entire patronage structure, grant present and future city workers full political freedom, and take affirmative action to distribute jobs and contracts fairly to minority people and businesses.[81]

Hence, Washington was opposed to patronage hiring on a number of grounds: because it deprived individuals of their freedom of speech, because it had not worked for Blacks in the past, and because he believed that it could not be administered fairly.

Indeed, some analysts believe that Washington's attack on patronage may have been one reason why so many white voters felt threatened by the prospect of his becoming mayor in 1983.[82] Whether that is so, or whether they merely feared that Blacks would receive all the patronage previously doled out to whites, or because many rejected the idea of having a Black mayor on racist grounds, the white population of Chicago clearly did feel threatened by the prospect of Washington's election. That sense of threat was demonstrated by the substantial vote — 48.2% — given to the candidate of the Republican Party, a previously moribund force in city politics.[83]

PART THREE: THE LAW GOVERNING PATRONAGE HIRING

While the dramatic political developments described above were taking place in Chicago, the question of patronage hiring in Chicago and Illinois slowly made its way to the Supreme Court.

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[81] D. TRAVIS, "HAROLD": THE PEOPLE'S MAYOR 121 (1989). Washington made this statement while campaigning for Congress in 1980. *Id.* at 20. Although Washington was never a model organization man, he was slated and backed by the machine until he formally broke away from the organization to run for mayor in 1977. *Id.* at 107-15.

[82] Graber, *Media Magic: Fashioning Characters for the 1983 Mayoral Race*, in THE MAKING OF THE MAYOR: CHICAGO 1983, *supra* note 39, at 75.

[83] *See* J. ALLSWANG, *supra* note 22, at 157.

A. Elrod v. Burns *and* Branti v. Finkel.

The seminal Supreme Court case on political discrimination in employment arose out of a challenge to the patronage practices of the Cook County Sheriff's office. In *Elrod v. Burns*,[84] various Republican non-civil-service employees of the sheriff's office sued to prevent the newly elected sheriff, a Democrat, from firing them in 1970, alleging that they were being discharged solely because they were not affiliated with or sponsored by the Democratic Party. The Supreme Court held that the discharges were impermissible, since they amounted to the denial of a benefit—government employment—based upon an unconstitutional condition—the coercion of an individual's freedom of political association—thus producing by indirection a result which the government would be forbidden to produce directly.[85] Moreover, as the plurality opinion pointed out,[86] patronage practices not only infringe upon the rights of the individual employee but are also detrimental to the electoral process as a whole, by deterring both current and potential employees from the free exercise of their rights of speech and association.[87]

There was little disagreement among the members of the *Elrod* Court that the patronage practices challenged did impose a penalty on the discharged employees' First Amendment rights. Thus, the challenged practice was required to survive strict scrutiny, and the government was forced to show:

(1) that the practice advances a "paramount" or "vital" governmental interest;
(2) that the gain to that interest outweighs the loss incurred to the protected rights; and
(3) that the practice furthers the vital governmental interest "by a means that is least restrictive of freedom of belief and association in achieving that end."[88]

The disagreement between the plurality and the dissenters in *Elrod* focused on the appropriate balancing of the interests advanced in justification of patronage. The government had suggested three allegedly vital interests served by the practice challenged in *Elrod*: (1) effective govern-

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84 427 U.S. 347, 350-51 (1976).

85 *Id.* at 359. In reaching this conclusion, the plurality relied upon the Court's prior opinions invalidating requirements which condition public employment in some fashion upon political belief, for example, the signature of a loyalty oath or non-membership in the Communist Party. *Id.* at 357-58. (citing Keyishian v. Board of Regents, 385 U.S. 589 (1967); Cafeteria Workers v. McElroy, 367 U.S. 886 (1961); Wieman v. Updegraff, 344 U.S. 183 (1952)).

86 Justice Brennan wrote the opinion for a three-justice plurality made up of Justices Brennan, White, and Marshall. Justices Stewart and Blackmun concurred, making clear that their opinion applied only to the discharge situation and reserving any opinion concerning its extension to hiring. *Elrod*, 427 U.S. at 374-75. Justices Burger and Rehnquist joined Justice Powell in dissent, and Justice Stevens took no part in the decision.

87 *Id.* at 369-70.

88 *Id.* at 362-63.

ment and the efficiency of public employees; (2) the need for politically loyal employees to implement the programs of a democratically elected administration; and (3) the preservation of the democratic process and of strong, broad-based political parties.[89] The plurality first rejected the argument based on the purported efficiency of patronage employees, on the grounds that the wholesale replacement of public employees at election time did not result either in efficiency or in the appointment of capable employees. Moreover, there were clearly less restrictive means to ensure the goal of an effective and efficient work force, for example, discharge for cause, on grounds of insubordination or poor job performance.[90]

Second, the plurality rejected the argument that patronage was necessary in order to ensure the political loyalty of public employees, who would therefore not obstruct the implementation of a new administration's policies. While recognizing that democratically elected governments do have an interest in the political loyalty of employees in policymaking positions, the plurality found that this interest could be served by allowing patronage dismissals solely of policymaking employees, on the assumption that they are the only ones in a position to obstruct policy.[91] In *Branti v. Finkel*,[92] the Court began to outline a test for determining whether an employee was a policymaker and thus exempt from the prohibition against political firing, settling upon a demonstration by the hiring authority that "party affiliation is an appropriate requirement for the effective performance of the public office involved."[93]

Finally, the *Elrod* plurality rejected the argument that patronage dismissals were necessary to the preservation of political parties and thus of the democratic process, because parties had both pre-existed patronage and survived its replacement in many locales by a merit system.[94] Moreover, even though patronage may serve as an incentive to political parties, the plurality concluded that the practice also retarded the democratic process, resulting in the entrenchment of one party to the exclusion of others.[95]

Justice Lewis Powell dissented in both *Elrod* and *Branti*. While accepting that political discharges did infringe upon the First Amendment rights of municipal employees, Justice Powell believed that patronage was nonetheless constitutional, because it advanced vital governmental interests.[96] In this respect, he stressed the historic role of patronage in democratizing the political process, its stimulation of political activity,

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89 *Id.* at 364-68.

90 *Id.* at 366.

91 *Id.* at 367.

92 445 U.S. 507 (1980).

93 *Id.* at 518.

94 *Elrod*, 427 U.S. at 369.

95 *Id.*

96 *Id.* at 378-86 (Powell, J., dissenting); *Branti*, 445 U.S. at 527-532 (Powell, J., dissenting).

and its contribution to the maintenance of strong and accountable parties, all of which will be discussed in considerable detail in Part Four, below.

B. Shakman v. Democratic Organization of Cook County.

During the period that *Elrod* was being litigated, *Shakman v. Democratic Organization of Cook County*[97] was making its way back and forth between the district court and the Seventh Circuit based on a substantially different theory. In contrast to *Elrod*, the *Shakman* plaintiffs were not public employees; instead, they were unsuccessful independent candidates for political office, who charged that their rights had been violated by the Cook County Democratic machine's extensive use of patronage. They alleged that the machine's requirement that current or prospective city and county employees perform political work for machine candidates gave a substantial electoral advantage to the plaintiffs' opponents.[98]

In 1972, a majority of the *Shakman* defendants entered into a consent decree concerning the treatment of current employees, prohibiting the conditioning of their continued employment upon political grounds.[99] This ended the so-called "firing phase" of *Shakman*, but the constitutionality of politically motivated hiring remained at issue. In 1977, the defendant employers entered into a stipulation admitting that preference in hiring for over 20,000 positions was given to persons sponsored by the machine; that such sponsorship was given in return for performing precinct work for the machine; and that the political work done by these patronage workers "helps elect candidates supported by the various members of the Democratic County Central Committee."[100] The issue of the constitutionality of patronage hiring was then submitted to the district court on cross motions for summary judgment.

In his 1979 decision on summary judgment, District Judge Nicholas Bua, relying primarily upon the Seventh Circuit's line of ballot placement cases,[101] held that patronage hiring was unconstitutional because it deprived independent candidates and voters of their First Amendment rights, thereby also violating the equal protection clause.[102] Although a

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97 For a history of the *Shakman* litigation from 1969 to 1979, see Shakman v. Democratic Organization of Cook County, 481 F. Supp. 1315, 1320-26 (N.D. Ill. 1979); *see also* Johnson, *Successful Reform Litigation: The Shakman Patronage Case*, 64 CHI.[-]KENT L. REV. 479, 481-93 (1988) (authored by one of the attorneys for the *Shakman* plaintiffs).

98 *Shakman*, 481 F. Supp. at 1321.

99 The May 5, 1972 consent judgment concerning current employees is attached as an appendix to Judge Bua's 1979 opinion concerning hiring. *See id.* at 1356-59.

100 *Id.* at 1325.

101 *Id.* at 1335-41. Ballot placement cases involve allegations of governmental interference with equality of participation in the electoral process by manipulation of the positions in which the names of candidates appear on the ballot. *See, e.g.*, Bohus v. Board of Election Commissioners, 447 F.2d 821 (7th Cir. 1971).

102 *Shakman*, 481 F. Supp. at 1355. Because the *Shakman* plaintiffs were not public employees

number of defendants appealed this ruling, several, including the City of Chicago, ultimately entered into a consent decree on this issue as well and agreed to implement the goal of non-political hiring.[103] A remedial order concerning hiring was entered by Judge Bua in 1983.[104]

After Harold Washington became mayor in April of 1983, the Washington Administration voluntarily embraced the consent decree and entered into negotiations with the attorneys for the *Shakman* plaintiffs.[105] Those negotiations led to the development of a set of Detailed Hiring Provisions to ensure that political considerations would not enter into the employment of nonpolicymaking personnel in Chicago city government.[106] Thus, the independent Democrats who had just acquired the mayor's office but did not yet control the City Council were prevented from solidifying their positions through the use of patronage, while patronage remained intact in other governmental bodies which had not entered into the *Shakman* consent decree and which were still in the hands of the machine Democrats.

In 1987, the Seventh Circuit overturned the *Shakman* judgment as to the non-consenting defendants, based on the plaintiffs' lack of standing.[107] Reversing its own 1970 decision on this issue,[108] the Seventh Circuit found that the injury alleged by the *Shakman* plaintiffs—failure of the independent candidates to be elected—was not "fairly traceable" by a clear chain of causation to the defendants' actions, *i.e.*, their policy and practice of patronage.[109] The Supreme Court denied certiorari,[110] presumably waiting for a case brought by a disappointed job applicant.

Thus, prior to the Supreme Court's June 1990 decision in *Rutan v. Republican Party of Illinois* ,[111] the City of Chicago—former bastion of patronage—was possibly the only local government with a federally en-

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or applicants for public jobs, Judge Bua specifically declined to rely upon the Supreme Court's decision in *Elrod v. Burns*. *Shakman*, 481 F. Supp. at 1329.

103 Johnson, *supra* note 97, at 492.

104 *Shakman*, 569 F. Supp. 177 (N.D. Ill. 1983).

105 The Washington Administration first negotiated the job titles to be included in a list of exempt, *i.e.*, policymaking, positions appended to the 1983 hiring judgment—a total of some 700 positions. *See Shakman*, 569 F. Supp. at 190-203. After some delay, and the imposition of a hiring freeze on the city by Judge Bua in April 1984, the city negotiated Principles for Plan of Compliance with the *Shakman* plaintiffs and ultimately drafted a set of Detailed Hiring Provisions which embodied those principles. *See* Chi. Tribune, May 7, 1984, § 1, at 1; *see also* Johnson, *supra* note 97, at 492-93. The Detailed Hiring Provisions went into effect in June of 1985. *See* Freedman, *Doing Battle with the Patronage Army: Politics, Courts, and Personnel Administration in Chicago*, 48 PUB. ADMIN. REV. 847, 848 (1988).

106 City of Chicago, *Detailed Hiring Provisions for Compliance with the* Shakman *Judgment*, Oct. 31, 1984 [hereinafter "Hiring Provisions"].

107 Shakman v. Dunne, 829 F.2d 1387 (7th Cir. 1987), *cert. denied*, 484 U.S. 1065 (1988).

108 *Shakman*, 435 F.2d 267 (7th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971).

109 *Shakman*, 829 F.2d at 1397.

110 *Shakman*, 484 U.S. 1065 (1988).

111 110 S. Ct. 2729 (1990).

forceable commitment to hire on non-political grounds. Although Mayor Harold Washington died in late 1987, the City of Chicago's Detailed Hiring Provisions are still in place; and the city's experience with implementing them may provide guidance for other governments as they bring their practices into compliance with the dictates of *Rutan*. Furthermore, as an irony of history, those Hiring Provisions now govern hiring under an administration presided over by Mayor Richard M. Daley, son of Richard J. Daley, the architect of the classic Chicago machine.[112]

C. Rutan v. Republican Party of Illinois.

In *Rutan v. Republican Party of Illinois*,[113] the plaintiffs challenged the hiring, promotion, transfer and recall practices of the Republican Party and the Governor's Office of the State of Illinois. They alleged that hiring decisions for positions with state government were based on whether they (1) had "voted in Republican primaries," (2) "provided financial or other support to the Republican Party and its candidates," (3) "promised to join and work for the Republican Party in the future," and (4) "had the support of Republican Party officials."[114] The Seventh Circuit, *en banc*, found that the challenged practices which were "the substantial equivalent of a dismissal" could form the basis for a claim under the First Amendment, but that it was not unconstitutional to base hiring decisions on political considerations.[115] Thus, in *Rutan,* the Supreme Court was finally forced to consider whether its holding in *Elrod* covered hiring as well as firing.

The *Rutan* Court held, five to four, that patronage hiring, as well as failures for political reasons to promote, transfer, and recall after layoff, violated the First Amendment.[116] Rejecting the defendants' attempt to distinguish hiring from firing on the ground that failure to hire did not place as severe a burden upon the rights of the disappointed job applicant as did the loss of a job, the majority found that these practices placed impermissible burdens on free speech and association.[117] In the absence of a vital governmental interest, patronage hiring thus amounted to placing an unconstitutional condition upon the receipt of a public benefit—public employment—and was therefore prohibited both by *Elrod* and by

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112 When the Black community was unable to unite around a single candidate in the 1989 special election to fill the vacancy left by Harold Washington's death, Richard M. Daley was elected mayor. As Cook County State's Attorney, Daley had in fact already entered into a hiring consent decree under *Shakman* to govern that office.

113 110 S. Ct. 2729 (1990).

114 *Id.* at 2732.

115 *Rutan*, 868 F.2d 943, 955-57 (7th Cir. 1989) (*en banc*).

116 *Rutan*, 110 S. Ct. at 2735-36, 2739. Justice Brennan was joined in the opinion by Justices White, Marshall, Blackmun, and Stevens.

117 *Id.* at 2738-39.

the extensive precedents governing unconstitutional conditions.[118]

The majority's rather summary opinion evoked a vehement dissent from Justice Scalia.[119] Like Justice Powell before him, Scalia raised a number of broad policy objections to the constitutional ban on patronage.[120] First, he argued that the institution of patronage is a long-lived American tradition which should not be disturbed.[121] Second, Scalia argued that patronage hiring should not be prohibited because of the historic role patronage has allegedly played in increasing political participation—and thus in the democratization of American politics.[122] Third, Scalia claimed that patronage employment has historically provided channels of upward mobility for lower and lower-middle class persons, which will now be closed to contemporary minority groups by the prohibition of patronage hiring.[123] Fourth, Scalia maintained that the institution of patronage is central to the American party system and that its prohibition will therefore have dire consequences for American political life.[124] Finally, Scalia mounted an objection based on remedy, claiming that patronage hiring cannot be effectively prohibited without constitutionalizing a civil service system or requiring the federal courts to review every local employment decision, thus opening the floodgates to litigation by every disappointed office-seeker.[125]

In Part Four, I will evaluate each of these objections in light of the voluminous social science literature concerning patronage hiring and the extensive experience of the City of Chicago with both patronage and its prohibition.

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118 *Id.* (citing Torcaso v. Watkins, 267 U.S. 488 (1961) (State could not refuse appointment on ground that applicant refused to declare belief in God); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (employment may not be premised upon loyalty oath); Elfbrandt v. Russell, 384 U.S. 11 (1966) (striking down loyalty oath as prerequisite for public employment); Sherbert v. Werner, 374 U.S. 398 (1963) (unemployment benefits may not be conditioned upon denial of First Amendment right); Speiser v. Randall, 357 U.S. 513 (1958) (tax exemption may not be conditioned upon restriction of constitutional rights)).

119 Justice Scalia was joined in his dissent by Justices Kennedy and O'Connor and by Chief Justice Rehnquist.

120 Unlike Justice Powell in *Elrod* and *Branti*, however, Justice Scalia rejected the majority's overall mode of analysis, arguing instead that the existence of patronage at the time of the founding of the republic must be interpreted to mean that it was not prohibited by the First Amendment and, alternatively, that restriction of the First Amendment rights of public employees does not require strict scrutiny. *Rutan*, 110 S. Ct. at 2746-52 (Scalia, J., dissenting).

121 *Id.* at 2748 (Scalia, J., dissenting).

122 *Id.* at 2754-55 (Scalia, J., dissenting).

123 *Id.* at 2755 (Scalia, J., dissenting).

124 *Id.* at 2753-54 (Scalia, J., dissenting).

125 *Id.* at 2747, 2758-59 (Scalia, J., dissenting).

PART FOUR: AN EVALUATION OF THE POLICY ARGUMENTS IN SUPPORT OF PATRONAGE HIRING

A. The Age of the Tradition.

The first of Scalia's arguments—that based on the age of the institution of patronage—amounts to the assertion that patronage hiring has been an accepted practice in American political life for a very long time and therefore should not be prohibited.[126] As he argued in *Rutan*, "[s]uch a venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court."[127] On one level, this argument appears to represent a simple Burkean reluctance to tinker, on the basis of an abstract principle of right, with any institution which has lasted a long time.[128]

On a deeper level, however, Justice Scalia's emphasis on the systemic value of patronage suggests an unacknowledged debt to the structural-functional theory of sociologist Robert Merton and, in particular, to Merton's analysis of the "latent functions" of the machine. In *Social Theory and Social Structure*, Merton posited that political machines, like any informal social pattern or structure which persists despite efforts at reform, must fulfill important functions which are otherwise not being addressed by formal structures.[129] Specifically, Merton thought that machines fulfilled a number of important functions, including (1) centralizing power in a system where power was formally dispersed, and (2) providing an alternative route of upward mobility for the lower classes in a society where manual labor was stigmatized.[130] If these functions were not served by any other structure, thought Merton, all attempts at reform were destined to fail.

Merton's analysis of this issue in *Social Theory and Social Struc-*

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126 Justice Scalia's argument based on the age of the tradition of patronage is also based on his belief that rights which were not clearly contained within the Constitution at the time of its drafting should not subsequently be read into the document, a doctrine of constitutional interpretation which merits extensive discussion in its own right, but which I will not address in this article.

127 *Rutan*, 110 S. Ct. at 2748 (Scalia, J., dissenting). As Justice Stevens points out in his concurrence, however, racial segregation was also a practice of very long standing before *Brown v. Board of Education*. *Rutan*, 110 S. Ct. at 2741. Moreover, the right-privilege distinction upon which the Court's prior attitude to this question rested has now been abolished. Thus, if public employment is a right, not a privilege, it may not be conditioned upon any unconstitutional factor. *Id.* at 2741-42.

128 As Burke said, bemoaning the passing of the *ancien regime* in France, "We are afraid to put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages." E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 99 (Mahoney ed. 1955). *See also* Wilson, *Justice Diffused: A Comparison of Edmund Burke's Conservatism with the Views of Five Conservative, Academic Judges*, 40 U. MIAMI L. REV. 913 (1986).

129 R. MERTON, *Social Theory and Social Structure* 71-81 (1949).

130 *Id.* at 72-73, 76-77.

ture—subsequently expanded and published separately[131]— provides the obvious theoretical underpinning for both the "age of the tradition" and the "upward mobility" arguments in support of patronage, although to my knowledge it has never been cited in any of the patronage cases. In essence, what Justices Powell and Scalia both argue is that patronage serves a number of functions in American political and social life—functions which may not be apparent from a superficial description of the institution yet which are vital to the political system.

However, Merton's analysis also suggests an appropriate framework for a critique of the structural-functional objections raised by the two justices, a critique which proceeds on their own terms. Under this framework, the following three-part inquiry is in order as to each of the vital interests patronage hiring is said to serve:

(1) How, precisely, is patronage assumed to fulfill this function, *i.e.*, what are the factual assumptions underlying the generalization?
(2) Did patronage hiring in fact perform this function historically?
(3) Does recent experience indicate that patronage will continue to do so today?

In proceeding to address Justice Scalia's arguments based on the alleged democratizing role of patronage, its function as a route of upward mobility, and its centrality to the American party system, it is important to keep this three-part inquiry in mind.

B. The Democratizing Function of Patronage Hiring.

The argument that patronage plays a democratizing role relies upon the assumption that patronage hiring brought individuals from newer, immigrant, and lower socio-economic groups into the political process by rewarding them for political activity and involving them in further political participation. As Justice Powell said in his *Elrod* dissent, "Patronage practices broadened the base of political participation by providing incentives to take part in the process, thereby increasing the volume of political discourse in society."[132] Justice Scalia agrees with Powell, arguing in *Rutan* that patronage "has been a powerful means of achieving the social and political integration of excluded groups."[133]

The operative assumption underlying these statements is that patronage parties deal in two commodities—jobs and votes—and that they use the former to maximize the latter. Moreover, access to the first commodity—public jobs—is retained only so long as they outpoll competing parties. Thus, the "economics" of patronage parties allegedly places them under an inexorable pressure to bring new groups into the political process, which they accomplish by using their armies of patronage work-

131 *See* Merton, *The Latent Functions of the Machine*, in URBAN BOSSES, MACHINES AND PROGRESSIVE REFORMERS, *supra* note 21, at 27-37.

132 *Elrod*, 427 U.S. at 379 (Powell, J., dissenting).

133 *Rutan*, 110 S. Ct. at 2754-55 (Scalia, J., dissenting).

ers to naturalize and register new voters and to mobilize them on election day.

Machines clearly did function to bring in *some* new groups during *some* historical periods. The early Chicago machine is an example of a patronage party which did in fact incorporate a series of ethnic groups into political life, but it did so only because it faced substantial competition both from the Republican Party and from factions within the Democratic Party.[134] Thus, as Republican Thompson reached out to newer ethnic groups, including Blacks, and Cermak struggled with the Irish for control of the Democratic party, the machine competed for Polish, Czech, Jewish, and Italian votes in addition to those of the older Irish immigrants.[135]

In other cities, however, the classic urban machine did not perform a democratizing function on any consistent basis. Recent studies show that the typical Irish machine was slow to incorporate the Southern and Eastern European immigrants who arrived after the Irish.[136] In cities other than Chicago, where Irish machines succeeded in putting together a "minimal winning electoral coalition" without appealing to newer immigrants who might compete with the Irish for jobs and political power, urban machines had no incentive to mobilize the more recently arrived ethnic groups, and did not do so.[137] In Boston, for example, where the Irish comprised a majority of the population and could thus control city government without relying upon the votes of any of the newer groups, the machine played virtually no role in integrating those other ethnic groups into political life.[138] Thus, the more a machine was able to consolidate its power by use of patronage, the less likely it was to fulfill the function of broadening the number of groups involved in the political process.

It is not difficult to understand why mature urban political machines did not consistently perform the democratizing functions Scalia and Powell have alleged that they did. A patronage party depends on the allocation of a scarce resource—public jobs. After the initial spurts in the growth of public employment in the late nineteenth and early twentieth centuries, it was simply not possible to increase the supply of municipal jobs without limit. Hence, the only workable strategy for a patronage party was to "deflate" the demand for this scarce resource so that it would not exceed the supply of employment opportunities.[139] If new groups continually entered the process, this delicate economy would be destroyed. Thus, patronage parties which have consolidated power gen-

134 S. ERIE, *supra* note 24, at 101-02, 125-26.
135 J. ALLSWANG, *supra* note 22, at 98-109.
136 S. ERIE, *supra* note 24, at 69, 92-95.
137 *Id.* at 69, 94.
138 *Id.* at 128.
139 *Id.* at 217-19.

erally have not sought to maximize participation of new groups in the political process. Instead, they are highly selective mobilizers and have emphasized the deliverability and controllability of votes over vote-maximization.[140]

This experience is clearly demonstrated in the tumultuous relationship of the Chicago machine to the city's Black population. Although the Black wards loyally voted for the machine, actual voter turnout in those wards was consistently low.[141] Yet the machine continually ignored this fact, concentrating its resources instead upon mobilizing the vote in the white ethnic wards where its traditional supporters lived.[142] Thus, the machine did not reach out to encourage the participation of Black voters in Chicago and in fact depended for its continued control upon their low rates of electoral participation. This pattern continued for as long as the machine commanded a "minimal winning coalition" based upon the votes of its traditional supporters and a predictably low turnout by other ethnic groups—roughly from the election of Cermak in 1931 until the election of Harold Washington more than 50 years later. In fact, in the 1960s, when Mayor Daley no longer needed a large Black vote to maintain his office, the machine actively gerrymandered city wards on a racial basis in order to dilute the voting power of minority voters.[143] Thus, it cannot fairly be said that the Chicago machine performed a democratizing function for these groups.

Moreover, even if patronage parties had effectively performed a democratizing function in the past, it is unlikely that they could continue to do so today in the hands of white or Black mayors. Not only is public employment a scarce resource; it is also a declining one.[144] Unlike the era when the Irish machines came to power and the public sphere was expanding, federal cutbacks have forced substantial retrenchment by municipal governments, particularly since the election of Ronald Reagan in 1980.[145] In Chicago, for example, the size of the city work force declined by more than 6,000 workers between 1980 and 1987; and that figure con-

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140 *See* Kemp & Lineberry, *supra* note 45, at 8-12.

141 *Id.* at 16-17.

142 P. KLEPPNER, *supra* note 36, at 83; Preston, *supra* note 57, at 42.

143 S. ERIE, *supra* note 24, at 168. The City Council again attempted racial gerrymandering after the 1980 census, but the Council's efforts did not survive challenge in federal court. Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985). *See also* Colman & Brody, Ketchum v. Byrne: *The Hard Lessons of Discriminatory Redistricting in Chicago*, 64 CHI.[-]KENT L. REV. 497 (1988).

144 After growing steadily from 1960 through 1974, the rate of growth in total municipal employment in the United States began to fall in 1975. The total municipal work force grew from 1,692,000 in 1960 to a high of 2,561,000 in 1980; that total had declined to 2,541,000 by 1987. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1990, at 304 (1990).

145 The total number of municipal employees in the United States fell sharply in the first years of the Reagan Presidency—by 3.6% in 1981 and by 2.9% in 1982. *Id.*

tinues to fall.[146] In short, there is simply less patronage to go around. Moreover, Blacks now constitute a majority or near-majority of the electorate in many urban areas.[147] Thus, a Black machine, like the Irish in Boston, might have little incentive to share this declining resource with other groups, such as Latinos or recent immigrants from Eastern Europe, thereby encouraging their participation in the political process as well. Thus, although patronage hiring may have made a contribution to democratizing the political process at some times and in some places, it is far from clear that it could continue to perform this function today.

C. The Upward Mobility Function.

A third argument raised in opposition to the abolition of patronage is that patronage parties historically provided channels of upward mobility for immigrants and persons of lower socio-economic status, resulting in the ultimate social and economic assimilation of the groups to which they belonged.[148] Thus, insists Justice Scalia, "[t]he abolition of patronage . . . prevents groups that have only recently obtained political power, especially blacks, from following this path to economic and social advancement."[149] Several assumptions underlie this argument. First, it assumes that patronage employment is a direct benefit to members of ethnic groups who have access to it. Second, it assumes that members of *different* ethnic groups will be the beneficiaries of patronage, either at the same time or consecutively. Third, this argument assumes that patronage benefits not only the individuals rewarded with jobs, but also the ethnic groups to which they belong, by giving them access to political power which can be used to pursue the political and social goals of their respective groups. Finally, the "upward mobility" argument assumes that the benefits which the members of a group derive from patronage—both the economic benefits of public employment and the attendant political power—translate into social and economic advancement for that group as a whole, culminating in its assimilation into the American middle class. A careful examination of the historical evidence leads one to question these assumptions.

Patronage obviously does benefit individual members of ethnic groups who obtain patronage jobs. For example, the public sector in New York City employed nearly 25% of all first and second generation

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146 *Id.* at 305; *see also* Chi. Tribune, May 24, 1990, § 3, at 3, col. 4.

147 In 1980, the Black population of Chicago made up 39.8% of the total; comparable 1980 figures for other major cities are: Atlanta—66.6%; Baltimore—54.8%; Cleveland—43.8%; Detroit—63.1%; Memphis—47.6%; Newark—58.2%; St. Louis—45.6%; and Washington, D.C.—70.3%. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1990, at 34-36 (1990).

148 *See, e.g.*, R. DAHL, WHO GOVERNS? 52-62 (1961); R. MERTON, *supra* note 129, at 76-77.

149 Rutan v. Republican Party of Illinois, 110 S. Ct. 2729, 2755 (1990) (Scalia, J., dissenting). *See also* Branti v. Finkel, 445 U.S. 507, 529 n.11 (1980) (Powell, J., dissenting).

Irish workers in 1930—an obvious boon during the Depression.[150] However, the Irish did not share these benefits with members of other ethnic groups. Except in Chicago, where the machine faced substantial competition from the Republican Party until the 1930s, urban machines did not parcel out the riches of patronage to the Italians or Eastern European immigrants who came to America in the early twentieth century.[151] In Boston, for example, Italians comprised 95% of the residents of the North End by 1920, but were rewarded only with symbolic gestures, like party sponsorship of legislation to make Columbus Day a holiday, and minor party positions.[152] The Irish party chieftains dispensed food, loans, and licenses to them as well—but *not* city jobs, nominations to office, or major party positions.[153] Thus, if patronage benefitted any group *qua* group, this can only be said of the Irish.

In Chicago, even though members of ethnic groups other than the Irish were given patronage jobs, Black Chicagoans were not included in this largesse. Blacks never received patronage positions in numbers commensurate with their voting strength, even prior to the consolidation of Cermak's multi-ethnic coalition and even though they had arrived in Chicago long before other groups.[154] Although they were dependable supporters of the Chicago machine from the time of the New Deal, Black voters received relatively few jobs and those they did receive were, for the most part, low-paid and nonpolicymaking.[155] In short, patronage does not appear to have worked to the advantage of Blacks as a group in Chicago, although some individuals did receive employment.

Moreover, the historical experience of Blacks in Chicago also leads one to question whether giving public jobs to individuals leads to either political or socio-economic advancement for the groups to which they belong. One comparative study concludes that the employment of individual Blacks in Chicago city government under the machine resulted instead in the co-optation of those individuals rather than the incorporation of the group to which they belonged.[156] Comparing Chicago with Philadelphia, Atlanta, and Gary, Indiana, the study's author posits that any real redistribution of political power is unlikely to occur in cities dominated by patronage parties and machines. Rather, Black political gains are obtained in settings where politics are more equally balanced between competing parties or factions, creating room for minority groups

150 S. ERIE, *supra* note 24, at 89.

151 *Id.* at 7, 101-06.

152 *Id.* at 101-03.

153 *Id.* at 103.

154 *See, e.g.*, P. KLEPPNER, *supra* note 36, at 64-90; D. PINDERHUGHES, *supra* note 62, at 99.

155 P. KLEPPNER, *supra* note 36, at 72; Preston, *supra* note 57, at 92.

156 *See* R. Keiser, Black Political Incorporation or Subordination?: Political Competitiveness and Leadership Formation Prior to the Election of Black Mayors 65-166 (1989) (unpublished Ph.D. dissertation, University of California at Berkeley).

to bargain to their advantage.[157] Thus, in Philadelphia and Atlanta, where mayoral elections have been closely contested, with Black voters sometimes providing the margin of victory, Black leaders have won positions of increasing political power and have had influence over policymaking on important issues.[158] In Chicago, by contrast, a strong political machine which faced little competition did little to incorporate Blacks.[159] Indeed, as the Black population increased in numbers, approaching majority status, the Chicago machine relied instead upon its declining white ethnic base for support and largely discounted or ignored the interests and demands of Black voters.

One explanation for this phenomenon is offered by Kathleen Kemp and Robert Lineberry, who point out that political machines are based on an "exchange" model which may have become obsolete, at least in Chicago.[160] Under this model, voters traded political participation—votes, funds and services—for tangible, divisible benefits—like jobs—which could be allocated to individuals. However, by the 1960s, the white ethnic children of the immigrants either had moved to the suburbs or no longer needed the old types of material incentives. Instead they sought " 'cultural dominance' particularly over space (e.g., neighborhoods) and over culture-transmitting institutions (e.g., schools)."[161] These demands—unlike patronage, which could be doled out piecemeal to members of each group—were indivisible and collective. More important, these demands were diametrically opposed to the goals of the Black population, who sought either to integrate those same institutions or to control them themselves.[162] In short, the demands of both white and Black voters had become collective and indivisible, and politics became a zero-sum game. Faced with the fact that the demands of Black voters could not be addressed without alienating its traditional power base, the machine chose to identify with the goals of its traditional white ethnic supporters.

Kemp and Lineberry's account is a good description of what happened to the white ethnic machine in Chicago. However, it does not explain why this change did not merely reflect a transition between rising and falling ethnic groups. Why didn't Black voters simply take control of the patronage apparatus and use it to advance their own group into the middle-class suburbs? Other scholars suggest that inherent impediments to the use of patronage to advance the socio-economic status of a minority group may exist. For example, Dianne Pinderhughes concludes from her study of race and ethnicity in Chicago that material benefits, like

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157 *Id.* at 327-37. *See also* V. O. KEY, SOUTHERN POLITICS 298-314 (1950).

158 Keiser, *supra* note 156, at 167-240, 269-326.

159 *Id.* at 65-166.

160 Kemp & Lineberry, *supra* note 45.

161 *Id.* at 18.

162 *Id.* at 23.

patronage jobs, which are distributed to selected individuals in the context of a system that differentiates among individuals based on group characteristics, may have no ameliorative or integrative effect on a group's collective status at all.[163] Thus, if Blacks are identified as members of a racial group rather than as individuals, the failure to recognize that their collective status is subordinate may have the effect of reinforcing that group's secondary status rather than improving the status of the group as a whole.[164] In this sense, Blacks benefit more from politically neutral hiring which takes affirmative action concerns into account and assists the group as a whole, than from a system under which some individuals are chosen to receive public jobs.

The history of Black employment in Chicago city government seems to support this conclusion. Since the prohibition of patronage hiring under *Shakman*, the number of Blacks in city jobs has increased dramatically. Today, under a judicially enforceable hiring plan which prohibits taking political views or affiliation into account, Blacks make up 35% of the total municipal work force, in a city where the Black population is 39.8% of the total population.[165] Given the low levels of Black employment by the city in the heyday of the machine and the lack of turnover in government jobs, which are valued for their security, this number represents a substantial advance in the employment of minorities by the city. Although this advance may be partly attributable to affirmative action programs during the Washington Administration, it has not declined during the administration of the second Mayor Daley. In fact, the number of Blacks in positions covered by the *Shakman* decree increased from 14,041 in January of 1989, when Daley took office, to 14,270 in August 1990.[166] Thus, the abolition of patronage in Chicago does not appear to have harmed Black jobseekers, as Justice Scalia fears; and it has most probably helped them.

Finally, one may question the assumption that a city job is likely to provide a route to economic advancement and assimilation into the American middle class today, if it ever did. Indeed, Steven Erie suggests that even the Irish may not have benefitted from the institution of patronage in this way.[167] Political machines have a definite incentive to create blue-collar patronage—police, fire, and laborers' jobs—because it costs less, allows the creation of more jobs, and thus results in more

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163 D. PINDERHUGHES, *supra* note 62, at 55.

164 *Id.* at 10, 54-55.

165 In August 1990, Blacks filled approximately 35% of the 14,591 positions in city government, and 35.7% of the *Shakman*-exempt positions, according to statistics obtained by the author from the City of Chicago Department of Personnel.

166 *Id.* The number of Blacks in *Shakman*-exempt positions fell during this same period, from 45.2% to 35.7% of the total, although the representation of other minorities, especially Hispanics, in policymaking positions increased. *Id.*

167 S. ERIE, *supra* note 24, at 7-8, 87-90.

votes.[168] Erie concludes that Irish domination of urban political patronage may have *inhibited* the economic and social advance of the Irish as a group, by channeling them into these lower-paid, lower-status, but secure jobs in the public sector at a time when other groups were making substantial gains in the private sector.[169] Irish-Americans in fact did take a longer time to enter the middle class than did other immigrants who did not share the advantage of speaking English—the Germans and Scandinavians, for example.[170] Patronage is unlikely to work better for today's minority groups than it did for the Irish in the era of job creation in the cities, an expanding economy, and relatively open channels of social mobility.

In sum, the service of patronage-based parties as facilitators of upward mobility is vastly overrated. Although patronage employment obviously did benefit many individuals, recent research casts doubt on whether patronage in fact resulted in upward mobility for any ethnic group, including the Irish; and it is clear that it failed to do so for the Black population of Chicago, despite that group's political loyalty. In short, the historical data suggests that it would be a serious mistake for contemporary minority groups to emulate the supposed Irish route to the middle class, even if the United States Supreme Court had not declared patronage hiring unconstitutional.

D. Patronage and the American Party System.

An additional objection to the abolition of patronage hiring is that patronage is allegedly central to the American party system and thus to democratic government in the United States. As Justice Scalia stated in *Rutan*, "It is self-evident that eliminating patronage will significantly undermine party discipline; and that as party discipline wanes, so will the strength of the two-party system."[171] Justice Scalia expressed particular concern about the rise of interest groups, to which he feels the prohibition of patronage has contributed.[172]

The argument based on the centrality of patronage to the American party system rests upon a number of empirical assumptions:

(1) that political activity depends upon material incentives;
(2) that parties which use jobs as incentives and rewards are strong and internally disciplined and those which do not are weak and undisciplined; and
(3) that strong parties are central to American government, because they

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168 *Id.* at 7-8.

169 *Id.* at 89-90, 241-42.

170 *Id.* at 241.

171 Rutan v. Republican Party of Illinois, 110 S. Ct. 2729, 2753-54 (1990) (Scalia, J., dissenting).

172 *See id.* at 2754.

> aggregate interests, on the one hand, and provide a vehicle for accountability to the electorate, on the other.

Again, social science research casts doubt upon the validity of these assumptions.

One must concede from the outset that machines have in the past been able to spur political activity by requiring it as the price of obtaining or maintaining a government job. In Chicago, patronage employees were required to perform precinct work and to return two percent of their salaries to the Democratic Organization as payment for their jobs.[173] However, there are also studies which show that high levels of political activity—canvassing, campaigning, and running elections, for example—do not necessarily correlate with patronage.[174] As Frank Sorauf has pointed out, high levels of political participation and strong parties also exist in the absence of patronage systems—in Wisconsin and on the West Coast, for example.[175] Indeed, people may engage in these activities simply because they enjoy them or are genuinely interested in political issues, rather than for material incentives.[176] Abner Mikva, who ran successfully for both the state legislature and for Congress as an anti-machine candidate during the Daley era, has said:

> I think you can accomplish those results that the political system wants to accomplish by volunteers, particularly in an area like this one where you have a lot of young people, a lot of people who are interested in politics, not because they want jobs, but because they believe in certain causes. You can accomplish those same results that the Marzullos accomplish on a volunteer basis.[177]

In addition, as James Q. Wilson points out, patronage is not in fact a very flexible or effective instrument to attain the desired goals of party activity, discipline, and accountability.[178] Patronage operates better as reward than as incentive; and once a job is awarded, vested interests develop and the pie cannot be redistributed.[179] Thus, although patronage theoretically should be used as an incentive to extract future political work, in reality it tends to be awarded retrospectively, to reward individ-

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173 Johnson, *supra* note 97, at 482.

174 *See, e.g.*, Sorauf, *Patronage and Party*, 3 MIDWEST J. POL. SCI. 115 (1959); Sorauf, *The Silent Revolution in Patronage*, 20 PUB. ADMIN. REV. 28 (1960); Sorauf, *State Patronage in a Rural County*, 50 AM. POL. SCI. REV. 1046 (1956).

175 Sorauf, *Patronage and Party*, *supra* note 174, at 118.

176 Some studies of the Chicago machine itself, in fact, suggest that an "affectual exchange model"—emphasizing social interaction and involvement in the public political life of the urban community, rather than material incentives—may be more explanatory of the voter loyalty to the machine than a material exchange model. *See, e.g.*, T. GUTERBOCK, MACHINE POLITICS IN TRANSITION: PARTY AND COMMUNITY IN CHICAGO (1980).

177 M. RAKOVE, *supra* note 2, at 320-21. Vito Marzullo was a long-time machine alderman from the west side of Chicago.

178 Wilson, *supra* note 1, at 369.

179 *Id.* at 377-78; *see also* Johnston, *Patrons and Clients, Jobs and Machines: A Case Study of the Uses of Patronage*, 73 AM. POL. SCI. REV. 385, 395 (1979).

uals and groups who have been helpful in the past.[180] The result, according to Wilson, is that precinct workers who have been given patronage jobs carry out very limited political activity, canvassing principally their own friends and a small group of voters who are well known.[181] Moreover, machines, like all organizations, have more than one goal. They seek not only to attract party workers and to get out the vote, but also to maintain the control of the dominant boss or faction over the organization and to control elected officials.[182] However, the use of patronage in pursuit of one goal—the control of elected officials, for example—often conflicts with its use for another end, such as internal organizational control. Yet organizational control tends to trump all other goals and is always given primacy over either vote-maximization or the encouragement of political activity.[183]

Thus, patronage may not be consistently effective in eliciting political activity, although it does usually lead to the construction of a strong and disciplined party. A strong one-party system is presumably not what Justice Scalia had in mind, however.[184] Yet that is the traditional outcome of patronage politics—the long-time reign of Tammany Hall in New York politics and the virtual death of the Republican Party in Chicago city politics after 1931 are good examples. In theory, of course, either party may offer jobs to its supporters if the "ins" are unseated by the "outs"; but in fact, a Republican candidate for mayor of Chicago has not been able to make a credible promise of municipal employment for more than 50 years. In short, the advantage patronage may have in strengthening one party is simultaneously a major disadvantage to the two-party system, which works best when parties are more evenly matched and occasionally alternate in office.

The real specter which haunts Justice Scalia's *Rutan* dissent is the splintering of American politics into competition among interest groups.[185] Although the influence of well-financed, often single-issue, interest groups in contemporary American politics is undeniable, there is little, if any, support for Scalia's proposition that the Supreme Court's decisions in *Elrod* and *Branti* played a role in this phenomenon.[186] Pa-

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180 Wilson, *supra* note 1, at 376-77.

181 *Id.* at 377 n.11.

182 *Id.* at 371.

183 *Id.* at 371-72, 375.

184 Although Justice Scalia states in *Rutan* that a "patronage system . . . fosters the two-party system," he appears to be more concerned with the possibility that this system give way to a multi-party system than with the possibility of a monopoly of power by one party. See Rutan v. Republican Party of Illinois, 110 S. Ct. 2729, 2754 (1990) (Scalia, J., dissenting).

185 *See id.* (noting the "destabilizing nature of a system in which candidates cannot rely upon patronage-based party loyalty for their campaign support, but must attract workers and raise funds by appealing to various interest groups").

186 Although Justice Scalia says that "[t]here is little doubt" that this is so, *id.* at 2754, the citation which follows his statement contains no support for the proposition. *See* Fitts, *The Vices of*

tronage parties may be able to resist the demands of interest groups, it is true. A pithy quotation from Vito Marzullo, the long-time Italian machine alderman from a ward which was by the time of this interchange largely dominated by Blacks and Hispanics, illustrates this principle:

> One time twenty fellows come in — ten Black Panthers, ten Mexican, an Irish white priest from Precious Blood Church, with a 15- or 16-year-old girl. . . . "Alderman, we got certain demands to make of you!". . . I took one look at 'em all around. I say, "Look, sir, before you go any further, I want you to know you don't make no goddam demands of this alderman, you understand? Who's your precinct captain?" So the priest says to me, "We represent 2,000 people in Precious Blood parish." I say, "Who died and elected you boss? I'm the elected boss in this ward." The priest says, "Alderman, that the way you talk to us? After all, you're our alderman." I say, "You shut up! You're not only disgrace my religion, you're a disgrace all religion." I say, "What are you doing down here with all these animals in the first place? Get outta here, never come back here again!" He says, "We'll see you're never elected alderman again!" I say, "I'll be alderman when you're dead and buried."[187]

As this excerpt and the history of the Chicago machine demonstrate, a patronage party securely in control of city government *is* able to resist the demands of interest groups; but it is also not in the business of interest aggregation, the function which Justice Scalia assumes will be performed by a strong party system. Rather than brokering interests, the Chicago machine simply tried to ignore the interests of large minority groups for a very long period of time.

In fact, a longing for strong and accountable parties which can effectuate the popular will may well be utopian in the American political context. This longing appears to reflect, at least in part, the recurrent American attraction for the British system of disciplined and accountable parties.[188] The British party system, however, is the product of a political culture which is less diverse than ours and a political system which is uncomplicated by federalism and the separation of powers. Members of Parliament are selected, in effect, by party; and they vote according to party line, making it possible to hold them accountable for the policies they implement.[189] By contrast, patronage parties, though

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Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process, 136 U. PA. L. REV. 1567, 1603-1607 (1988) [hereinafter Fitts, *The Vices of Virtue*].

187 M. RAKOVE, *supra* note 2, at 51. Vito Marzullo did in fact outlive Harold Washington; the priest's life span is not known to this author.

188 *See, e.g.*, W. WILSON, CONGRESSIONAL GOVERNMENT (1885); Am. Pol. Sci. Ass'n, *Toward a More Responsible Two-Party System*, 44 AM. POL. SCI. REV. 1 (Supp. 1950). In fact, Justice Scalia cites to a description of this literature in *Rutan*. 110 S. Ct. at 2754 (citing Fitts, *The Vices of Virtue*, *supra* note 186, at 1603-07).

189 S. FINER, R. MACRIDIS, K. DEUTSCH, & V. ASPATURIAN, MODERN POLITICAL SYSTEMS: EUROPE 67 (1972).

strong, are notoriously indifferent to issues and policies,[190] making them rather bad vehicles for policy-implementation and accountability. As Abner Mikva put it, precinct captains in Chicago would deliver the vote for "Adolf Hitler if he was on the Democratic ticket."[191]

Another aspect of democratic accountability is a party's capacity to deliver on its promises by implementing the program for which it was elected. This requires both an institutional capacity to move the party program through the legislative process and the ability to implement its policies when they have been passed. American parties, unlike their British counterparts, have never been noted for their accountability in this sense, either, especially on the local level. American municipal institutions, with their elements of Jacksonian direct democracy and Madisonian checks and balances, are cumbersome and characterized by an intentional dispersion of power. To effectuate her policy, a popularly elected mayor may require the cooperation of a city council controlled by an opposing party or faction. Chicago, for example, has a weak-mayor form of government,[192] a fact which was eclipsed during Mayor Richard J. Daley's term of office but which immediately became apparent during the so-called "Council Wars" in the early years of the Harold Washington administration.[193] Whereas Mayor Daley had been able to use his patronage organization to control all but a few independent aldermen and thus to turn the City Council into a virtual rubber stamp, Washington's administration was essentially checkmated until a by-election permitted it to gain a majority of votes in the Council.[194] In other words, Daley used patronage to organize and centralize power which was formally fragmented, the very method described by Robert Merton.[195] But the use of patronage as an "end run" around what are perceived to be structural or constitutional deficits in American political institutions is at least a questionable strategy as a matter of law.

Finally, patronage is sometimes supported, as it was by Justice Powell in *Branti*, on the grounds that "[e]lected officials depend upon appointees who hold similar views to carry out their policies and administer

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190 *See, e.g.*, Wolfinger, *supra* note 19, at 380-81; W. SAYRE & H. KAUFMAN, GOVERNING NEW YORK CITY 452, 474 (1960).

191 M. RAKOVE, *supra* note 2, at 320.

192 Under a weak-mayor system, the council has both legislative and executive functions; for example, aldermen may serve on a variety of boards and commissions and have substantial powers which would otherwise be associated with the executive. C. ADRIAN, GOVERNING URBAN AMERICA 200 (1961).

193 After Washington's election in 1983, the machine's leaders in the city council, Aldermen Vrdolyak and Burke, assembled a working majority of 29 white ethnic aldermen (the "Vrdolyak 29") which successfully blocked many of the initiatives of Mayor Washington and his voting bloc of 21 Black, Hispanic, and white liberal aldermen (the "Washington 21") until a by-election three years later. This period of stalemate and accompanying war of words in City Council came to be known as the period of "Council Wars." *See* D. TRAVIS, *supra* note 81, at 211-53.

194 *Id.*

195 R. MERTON, *supra* note 129, at 72.

their programs."[196] This is another aspect of the argument based on party accountability, because it assumes that a party's programs will only be effectively implemented by its partisans. At one level, this argument is undeniably true, for the ability of a new administration to appoint its own administrative-managerial group is essential if a bureaucracy is to be responsive to the elected officials at its head.[197] Clearly the policymaking employees of municipal departments—the department heads, their top assistants, and a certain number of additional personnel—need to be exempt from the prohibition against political hiring. But this is a reality with which civil service systems, federal and local, have dealt for decades, by designating certain positions as exempt from civil service and thus subject to political appointment.

It is precisely such an exemption which is allowed under *Branti*. Although the courts are still struggling with *Branti*'s formulation of the test for positions in which "party affiliation is an appropriate requirement for the effective performance of the public office involved,"[198] local governments have also been creative in their attempts to deal with this relatively recent formulation. Under *Shakman*, for example, a total of some 900 city positions are currently listed on a "Schedule G" filed with the court. These positions are presumed to be either confidential or policymaking in nature, a presumption which must be defeated by a plaintiff suing under the *Shakman* decree.[199] Moreover, many cities, Chicago included, in fact have some form of civil service; and the classification of positions which are exempt from its protections has already been accomplished by municipal ordinance.[200] The most recent audit of compliance under the *Shakman* decree suggests that the positions exempted under *Shakman* simply be made coextensive with those which are exempt from career [civil] service protections under the personnel ordinance—a workable solution in many cities.[201] In short, Justice Scalia's conclusion that

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196 Branti v. Finkel, 445 U.S. 507, 529 (1980) (Powell, J., dissenting).

197 This conviction pervades the literature of public administration. *See, e.g.*, F. MOSHER, DEMOCRACY AND THE PUBLIC SERVICE 175-85 (2d ed. 1982); F. ROURKE, BUREAUCRACY, POLITICS, AND PUBLIC POLICY 89-99 (1969); GOVERNMENTAL MANPOWER FOR TOMORROW'S CITIES: A REPORT OF THE MUNICIPAL MANPOWER COMMISSION 62-63 (1962); NATIONAL CIVIL SERVICE LEAGUE, A MODEL PERSONNEL ADMINISTRATION LAW 4 (1970).

198 *Branti*, 445 U.S. at 518; *see* Martin, *A Decade of* Branti *Decisions: A Government Official's Guide to Patronage Dismissals*, 39 AM. U. L. REV. 11 (1989); Comment, *Patronage Dismissals and Compelling State Interests: Can the Policymaking/Nonpolicymaking Distinction Withstand Strict Scrutiny?*, 1978 S. ILL. L.J. 278.

199 *See* Shakman v. Democratic Organization of Cook County, 569 F. Supp. 177, 182, 189-203 (N.D. Ill. 1983). A total of 2.2% of Chicago city employees (900 positions) are currently exempt under *Shakman*, according to August 1990 statistics obtained by the author from the City of Chicago Department of Personnel.

200 *See, e.g.*, City of Chicago, Municipal Code 2-74-030 (formerly § 25.1-3).

201 CITY OF CHICAGO, COMPLIANCE AUDIT OF THE IMPLEMENTATION OF THE DETAILED HIRING PROVISIONS UNDER THE SHAKMAN JUDGMENT 55 (1989) (covering audit period from May 1, 1986, to April 30, 1988) [hereinafter "Audit II"]. Other authors have suggested that the functions of

Branti is the "most unmanageable of standards"[202] is overly pessimistic about the ability of local governments to bring their practices into compliance with the constitutional prohibition on patronage while still retaining the capacity to implement their policies and thus to ensure democratic accountability.

In sum, patronage is not the only way to fuel a party system, and it may not even be a very good method for doing so. Patronage more frequently defeats than encourages the goal of developing a strong two-party system. And though patronage can be used both to assemble the power to circumvent formal constitutional structures and to ensure the loyalty of government employees, its use for the first of these purposes is highly questionable; and it is unnecessary to ensure the second aim.

Although patronage hiring dates back to the infancy of our republic, as Justices Powell and Scalia have both emphasized,[203] this practice was prohibited on the federal level beginning with the Pendleton Act in 1883, without causing the demise of the two-party system. It is similarly unlikely that the party systems existing in American cities, counties, and states will be destroyed by the prohibition of patronage hiring on the local level—except that in some areas, political competition may finally replace a monopoly of power by one political group, as it has done in Chicago.[204] In retrospect, patronage politics may prove to have been, as some writers think, an American form of the clientelist politics[205] characteristic of less developed countries—a transitional form which has now made its way into the museum of antiquities.

E. The Remedial Objection.

Another objection raised by Justice Scalia to the prohibition of patronage hiring is based on the nature of the remedy necessary to implement that prohibition. Justice Scalia apparently believes that the remedy may be worse than the disease, effectively constitutionalizing civil service

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each municipal position should be analyzed and classified—where this has not already been done—and the basis for the classification carefully documented, so as to prevail in any subsequent litigation over the position. *See, e.g.*, Martin, *supra* note 198, at 57.

202 Rutan v. Republican Party of Illinois, 110 S. Ct. 2729, 2756-58 (1990) (Scalia, J., dissenting).

203 Elrod v. Burns, 427 U.S. 347, 378-78 (1976) (Powell, J., dissenting); *Rutan*, 110 S. Ct. at 2748-49 (Scalia, J., dissenting).

204 In Chicago, this competition has primarily taken the form of intra-party competition among "regular" (formerly machine) Democrats and independent or reform Democrats, although a separate Harold Washington Party fielded a slate of Black candidates in the 1990 general election.

205 "Clientelism" refers to the patron-client relationships linking landlord and peasant in traditional societies, or, more broadly, a form of politics favoring exchanges based on private individual or group benefits instead of the exchanges demanded by law, universal principles, or institutional procedures. *See, e.g.*, S. ERIE, *supra* note 24, at 229-35, and works cited therein; *see also* Toinet & Glenn, *Clientelism and Corruption in the 'Open' Society: The Case of the United States*, in PRIVATE PATRONAGE AND PUBLIC POWER: POLITICAL CLIENTELISM IN THE MODERN STATE 193-213 (C. Clapham ed. 1982).

and forcing the federal courts to preside over personnel systems and to review virtually every employment decision reached by a governmental body.[206] As Scalia states in his *Rutan* dissent, "[t]oday the Court makes its constitutional civil-service reform absolute, extending to all decisions regarding government employment."[207]

This statement is obviously hyperbole, for, as Justice Stevens points out in his concurrence, it is clearly possible to prohibit hiring upon political grounds without requiring the imposition of a civil service code and system.[208] An unsuccessful job applicant will be required to show that the decision not to employ her was motivated by the impermissible consideration of her political views, sponsorship, or affiliation.[209] Given the requirement of such a showing, a patronage case would not be essentially different from the myriad of cases in which the courts rule on employment decisions allegedly made on grounds of race or other illegitimate factors. In short, it is certainly possible, at least in theory, to hire for positions in city government without considering an applicant's political views yet without importing all the safeguards of a civil service system or handing over the operation of municipal personnel systems to the federal courts. The more pertinent question is whether it is possible to design a remedy which will be effective where political hiring has been a pervasive and deeply engrained system, without a period of heavy-handed and intrusive involvement by the federal courts. Restated thus, I will examine the remedial objection in light of the Chicago experience.

Chicago's experience implementing the *Shakman* judgment prohibiting political hiring provides valuable guidance as to the appropriate remedies to eliminate patronage hiring which has been systemic. These remedies may be very simple, so long as they are designed with an intelligent eye to the historical context. For example, in Chicago under the first Mayor Daley the city department charged with personnel policies and their implementation was simply bypassed in many employment decisions, as I have described above.[210] Job vacancies were instead listed with the machine, which then subdivided many of them among the ward offices. Outside these channels it was well-nigh impossible to gain information about any job openings which were not filled by competitive examination. Moreover, although most skilled positions were supposed to be filled by competitive examination, exams were held infrequently and positions were instead filled by "temporary appointments."[211]

The remedy in *Shakman* therefore began by requiring the city to

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206 *Rutan*, 110 S. Ct. at 2747 (Scalia, J., dissenting).

207 *Id.*

208 *Id.* at 2740 (Stevens, J., concurring) (citing Illinois State Employees Union v. Lewis, 473 F.2d 561, 567-68 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973)).

209 *Rutan*, 110 S. Ct. at 2740.

210 *See supra* notes 46-51 and accompanying text.

211 *See* P. KNAUSS, *supra* note 19, at 101-03.

make information about job vacancies available to the general public.[212] The court required the city to post notices of job availability, accompanied by objective job descriptions, in the Department of Personnel and in a number of outlying city facilities.[213] Other simple and obvious changes with significant remedial impact included a provision that a list of all job openings be given to any individual or organization requesting it and a requirement that the city occasionally place an advertisement in the local newspaper concerning the availability of this list.[214] The court also required the city to provide all current employees and job applicants with a description of their rights under the *Shakman* judgment.[215] Finally, the *Shakman* remedial order required the city to submit a more detailed plan of compliance within 120 days and to file quarterly affidavits and annual reports concerning compliance with the court for a period of ten years.[216]

Beyond these fairly minimal requirements, most of the remedial provisions under *Shakman* were the result of hard bargaining by the plaintiffs under the exigent circumstances of a hiring freeze imposed by the district court when the city failed to submit its compliance plan in a timely fashion.[217] The Detailed Hiring Provisions which resulted from these negotiations included specific procedures to be followed when hiring employees, as well as quite elaborate record-keeping and auditing requirements. To prevent politically appointed department heads from hiring their political allies in nonpolicymaking positions, the *Shakman* plaintiffs insisted upon the inclusion of a bifurcated hiring process, under which screening of applicants is performed by the Department of Personnel and a list of eligible candidates is then transmitted to the hiring department. For jobs requiring minimal skills—many of the positions in the Department of Streets and Sanitation, for example—the screening is done by the use of a simple lottery conducted after a period of notice of job availability.[218] For some skilled positions, the screening is performed by competitive examinations administered by the Department of Personnel.[219] For skilled positions not filled by examination, however, the Hiring Provisions mandate a rather elaborate and complicated review of candidates' credentials by the Department of Personnel, followed by referral of a certain number of candidates to the hiring department for

212 Many of the steps taken in Chicago, such as the public advertisement of job openings and the abolition of "temporary" jobs, were similar to those taken in the 1930s by New York City's famous "reform" mayor, Fiorello LaGuardia. S. ERIE, *supra* note 24, at 121-22.

213 Shakman v. Democratic Organization of Cook County, 569 F. Supp. 177, 180 (N.D. Ill 1983); *see also* Hiring Provisions, *supra* note 106, at III-2.

214 *Shakman*, 569 F. Supp. at 180-81.

215 *Id.* at 181.

216 *Id.* at 180-82.

217 In April 1984, District Judge Nicholas Bua imposed a freeze on all new hiring by the city to force it to file its plan of compliance, which was overdue. *See* Chi. Tribune, May 7, 1984, § 1, at 1.

218 Hiring Provisions, *supra* note 106, at IV-3 to IV-4.

219 *Id.* at IV-9.

consideration.[220]

None of these remedial measures requires the federal courts to step into the position of Commissioner of Personnel, yet they appear to have been very effective in eliminating political hiring within a relatively brief period of time. The compliance audit for the first year, 1985-1986, found that "with a few significant exceptions, the hiring procedures followed by the City to fill open positions were consistent with the intent of the Detailed Hiring Provisions."[221] A second audit, covering the period from 1986-1988, also concluded that the city was in substantial compliance with the *Shakman* principles and that "[t]he application of the Shakman hiring principles has undoubtedly achieved its basic purpose—the restriction of political hiring."[222]

At the same time, however, the second audit concluded that the Hiring Provisions instituted to implement the *Shakman* decree were unnecessarily cumbersome, causing lengthy delays in the hiring process and resulting in the city's inability to recruit the most highly qualified candidates for vacant positions.[223] Departments reported that the hiring process could take as long as two to four months to complete, causing the city to lose applicants whose skills were in demand in the private sector.[224] While admitting that many of these delays were caused by actions of the Budget Office, heavy workload in the Department of Personnel, and inefficiencies in the hiring departments, the auditor stressed that the *Shakman* provisions inserted an additional layer of formality and paperwork in the hiring process, making it difficult for the city to fill professional positions and high vacancy positions, each of which require expeditious hiring.[225] These problems appear to be caused primarily by the bifurcation of the hiring process between hiring by the departments and screening by the Department of Personnel, by consequent delays in getting lists of eligible candidates to the hiring departments, and by the extensive paperwork required by the auditing process outlined in the Hir-

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220 *Id.* at IV-1 to IV-16. For a more detailed description of the hiring plan implemented in Chicago, see Freedman, *supra* note 105, at 850-52.

221 SHAKMAN COMPLIANCE AUDIT FOR THE YEAR 1985-1986, Pt. II, at 7 (1986). The exceptions were said to be primarily due to inadequate recordkeeping, but the following instances of noncompliance were also noted: (1) the Department of Law and the Office of the Budget elected not to comply due to the allegedly confidential nature of their tasks; (2) the Department of Personnel did not participate in screening panel meetings for a two-month period in 1986, leaving both screening and hiring to the hiring departments; (3) commissioners of two departments were required to submit names of candidates hired to a mayoral liaison for authorization, resulting in unexplained delays of up to 90 days; and (4) four emergency appointments were rehired in 1985 on a priority basis as regular full-time employees within three months after their termination as emergency appointments, thus bypassing the screening and application procedures of the Hiring Provisions. *Id.*; *see also* Freedman, *supra* note 105, at 853-54.

222 Audit II, *supra* note 201, at 3, 57.

223 *Id.* at 3-4, 40.

224 *Id.* at 4.

225 *Id.* at 40-41.

ing Provisions.[226]

Based on these problems, must we conclude that the experience of Chicago in implementing the *Shakman* decree confirms Justice Scalia's predictions about the unworkability of any remedy for political hiring? I think not. However, governmental bodies seeking to bring their hiring practices into compliance with *Rutan* and federal courts issuing remedial orders in cases involving political hiring should take a careful look at the Chicago experience, both to learn from it and to avoid its pitfalls. At a minimum, the lesson they should draw is to keep their remedial measures simple and to avoid complicated mechanisms which may cause remedial hiring provisions to collapse under their own weight. Although different measures may be appropriate to address different historical situations, the Chicago experience suggests that the best remedy may simply be to publicize job vacancies widely, to disseminate information about the First Amendment rights of job applicants, and then to rely upon a professionalized personnel department, coupled with the threat of litigation by individuals whose rights are violated.

F. The Floodgates Objection.

Last, one must consider whether the prohibition of patronage hiring will lead to a flood of litigation. Justice Scalia argues that "When the courts are flooded with litigation under that most unmanageable of standards (*Branti*) brought by that most persistent and tenacious of suitors (the disappointed office-seeker) we may be moved to reconsider our intrusion into this entire field."[227] As with Scalia's other objections, his insistence that the *Rutan* decision will open the floodgates to countless lawsuits can be evaluated by looking at the aftermath of the *Shakman* judgment in Chicago. Although it has been illegal to condition public employment upon political grounds since the 1979 district court opinion in *Shakman*, which was followed by the remedial order entered by consent in 1983, by mid-1990 only two political discrimination cases had been brought by applicants for jobs with the City of Chicago.[228]

This fact may seem puzzling at first glance, since the pool of potential plaintiffs is obviously large and Justice Scalia seems so sure that every disappointed job-seeker will rush into federal court. There are several possible explanations why so few job applicants have brought suit against the city. One practical reason for the small number of lawsuits is the combination of *Elrod*'s prohibition against the firing of current employees and budgetary constraints on hiring new employees during this pe-

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226 *See id.* at 47-49. Many of the complaints focused on the delay in transmitting lists of referrals to the hiring departments and the necessity of then interviewing all of the candidates on the referral lists, if they had not previously been rank-ordered by lottery or examination.

227 Rutan v. Republican Party of Illinois, 110 S. Ct. 2729, 2758-59 (1990) (Scalia, J., dissenting).

228 This figure was obtained in telephonic interviews with Darka Papushkewych of the City of Chicago Department of Law in the Summer of 1990.

riod. If it is illegal to discharge nonpolicymaking employees on political grounds, then the only positions available for political hiring without the creation of new jobs are those which become available through attrition. However, the overall number of city employees has in fact been shrinking in the last decade. The total city work force has declined from a high of more than 43,000 employees to an estimated 38,000 in 1990, and that figure is projected to fall even more in the future.[229] Thus, hiring has simply not taken place in very large numbers during the period under study.

Even if large-scale hiring does resume in Chicago, however, potential plaintiffs and their attorneys will still face two substantial legal hurdles in any suit alleging political discrimination in hiring: first, establishing standing to sue, and second, meeting the *Mt. Healthy*[230] burden of proof. Since the time of the *Elrod* decision, the Supreme Court's interpretation of the standing requirement has become increasingly restrictive, resulting in the reversal of the *Shakman* case itself.[231] Under current doctrine, a plaintiff must show both that the injury suffered is fairly traceable to, or caused by, the defendant's action and that the injury is likely to be redressed by the action of the court.[232] Thus, an individual who was not hired for a city job would need to show not only that she had applied for such a job and did not get it, but also that she was among the smaller number of candidates who were under serious consideration for the position. Only by making such a showing could she reasonably argue that the court's decision would in fact result in relief for her. These twin requirements of "traceability" and "redressability" would thus tend to cut down the number of suits brought to challenge individual employment decisions, although they would not prevent class actions challenging quasi-institutionalized systems of patronage hiring.

The second hurdle to confront plaintiffs bringing political discrimination suits is an extremely difficult burden of proof. Courts faced with cases involving allegations of politically motivated employment decisions have repeatedly turned to *Mt. Healthy City School District Board of Education v. Doyle* for guidance.[233] *Mt. Healthy* requires that a plaintiff show that constitutionally protected conduct—freedom of expression and association in patronage cases—was a substantial motivating factor in the employer's decision.[234] The government may then establish as a defense that it would have made the same decision even in the absence of the

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229 Chi. Tribune, May 24, 1990, § 3, at 3.

230 Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

231 *Shakman*, 829 F.2d 1387 (7th Cir. 1987).

232 *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751-53 (1984). About the reversal of *Shakman* on grounds of standing, see *supra* text accompanying notes 107-09.

233 *See, e.g.*, Nekolny v. Painter, 653 F.2d 1164, 1166-68 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982); Tanner v. McCall, 625 F.2d 1183, 1195 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981); Gannon v. Daley, 561 F. Supp. 1377, 1379 n.3 (N.D. Ill. 1983), and cases cited therein.

234 *Mt. Healthy*, 429 U.S. at 285-87.

protected conduct.[235] Thus, a plaintiff must be prepared to show not only that she was exceptionally well-qualified for the job for which she applied, but also that there was no other non-prohibited reason why she was not hired. Assuming that both parties are represented by competent counsel, these heavy burdens on any potential plaintiff can be relied upon vastly to reduce the number of cases "flooding" through the proverbial gates. But if the constitutional prohibition upon restricting the First Amendment rights of public employees is to be effective, one would hope that it will not be reduced to a trickle.

CONCLUSION

In sum, my study of the available social science literature and of the Chicago experience leads me to conclude that Justice Scalia's prediction that dire consequences will flow from the prohibition of patronage is mistaken. The historical experience shows that patronage parties did not in fact play the beneficial role they are said to have played in American political life. Rather than bringing new groups into the political process, patronage parties have historically used patronage to perpetuate their own power and have relied upon selective mobilization of the vote instead of encouraging political participation in general. Although many individuals in certain groups did reap benefits from patronage, the impact upon excluded groups was not benign. In Chicago, for example, patronage was used to consolidate the political power of groups whose interests were directly opposed to those of the emerging Black near-majority.

By contrast, Blacks today make up approximately 35% of the municipal work force in Chicago; and lively political competition has replaced what Professor Peter Knauss once called a "one-party state."[236] Based upon the results of the first audit submitted to the federal district court, the attorney for the *Shakman* plaintiffs pronounced that "implementation of the decree has reduced dramatically the degree of coercion placed on new hires; it has improved the overall quality of hiring, and has dramatically reduced the extent to which city employment practices give an improper electioneering advantage to a favored political faction."[237] In short, based on the Chicago experience, the abolition of patronage hiring is unlikely to have the disastrous consequences for our political system which Justice Scalia predicts.

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235 *Id.* at 287.

236 P. KNAUSS, *supra* note 19.

237 Johnson, *supra* note 97, at 493.